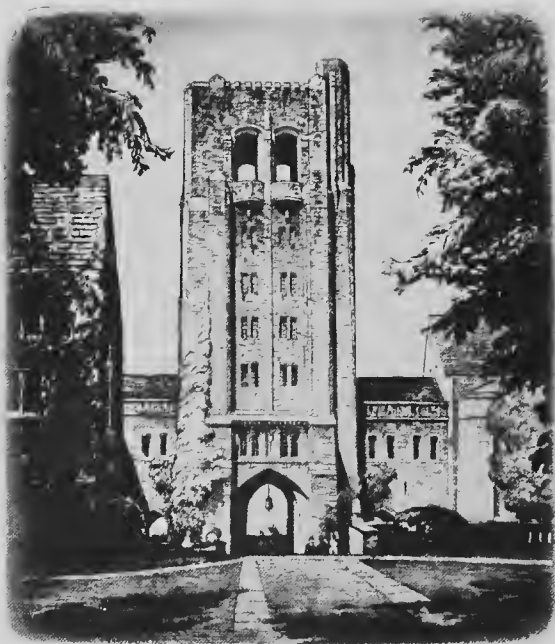


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THE LAW OF SALES
OF
PERSONAL PROPERTY.

BY
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SCHOOL OF LAW.

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PREFACE.

THIS book is intended especially for law students ; and its characteristic features have been determined largely by the writer's experience in the lecture-room. As a rule, questions are discussed with a fulness proportioned to the trouble which they have given to the student, or to his aptness to misapprehend the principles which they involve. On the other hand, a few topics which are found in most treatises on sales have been omitted, upon the assumption that the student has already mastered them. A discussion of such subjects as consideration, mutual assent, the capacity of parties, illegality and fraud, belongs to the study of pure contracts and of torts, and its repetition ought to be unnecessary during the investigation of a branch of applied contracts.

The provisions of the Statute of Frauds, bearing upon the sale of goods, have been treated in connection with the common-law topics to which respectively they relate. It is believed that this method has resulted in an economy of space in the book, and will conduce to a like economy of time and perplexity on the part of the student.

In the Appendix will be found the present British Factors Act, following the statutory provisions of France and Germany towards which British legislation has been tending. The American statutes which are reprinted, when considered in connection with the sketch of their history and of their strict construction by the courts, undisturbed by the legislature as that construction has remained, show that the mercantile community has not been as sensitive in this country as in Great Britain, to the pinch of the common-law rules on this subject.

A volume of cases, selected and arranged to accompany this book, is nearly ready for the press.

COLUMBIA UNIVERSITY SCHOOL OF LAW,
June, 1897.

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THE LAW OF SALES

OF

PERSONAL PROPERTY.

CHAPTER I.

THE NATURE AND FORMALITIES OF THE CONTRACT.

§ 1. Sale and Contract to Sell.

THE law of sales of personal property includes contracts of bargain and sale, and contracts for a future sale. By each of these contracts the seller engages to pass the general property in a thing, and to deliver possession thereof to the buyer, for a price paid or promised. These two engagements may be performable at the same time or at different times.

If the parties agree upon a present sale of a horse, or of any other specific chattel, which the purchaser is to take at once, but for which he is to pay at a stated future time, the title and possession pass immediately upon the formation of the contract. It may be stipulated, however, that the title shall pass at once, but that the seller may retain possession of the thing until a part or the whole of the price is paid. When these two engagements are expressly united or separated, no difficulty is experienced by the courts in dealing with them. But their union or sepa-

ration is often a matter of inference. In such cases the judges have not always kept in mind the distinction between the two engagements, and their confusion of thought has been fruitful of erroneous *dicta*,¹ and even of unsound decisions. This is noticeably true in actions growing out of cash sales.²

1. *Executed and Executory Contracts.* — It is a fundamental doctrine of this branch of English law, that in the case of a bargain and sale the engagement to pass the general property is executed by the formation of the contract, while in the case of a contract for a future sale it is to be executed thereafter. Hence a present sale, passing the general property in a thing, is often called an executed contract of sale; while a contract to pass the general property in the future is spoken of as executory.

2. *Their Respective Characteristics.* — These are distinctly marked, and are to be borne in mind throughout our discussion. (1) A bargain and sale is confined to existing goods, title to which can pass at once;³ while a contract to sell can apply either to present goods or to those which are to be acquired. (2) The latter contract confers upon the buyer a right *in personam*; and its non-performance entitles him to an action for a breach of contract only. A bargain and sale vests title to the specified goods in the buyer. Upon the seller's default in transferring possession, the buyer may sue him for a breach of contract, or in tort,⁴ and may even recover the goods from

¹ In *Olyphant v. Baker*, 5 Den. 379 (1848), Whittlesey, J., said: "In many cases of sales of personal property it is a very nice and difficult question to determine whether there has been a delivery, — whether title has passed." Throughout his opinion he treats these questions as identical.

² *Infra*.

³ *Cunningham v. Ashbrook*, 20 Mo. 553 (1855); *Haille v. Smith*, 1 Bos. & Pul. 563 (1796).

⁴ *Chinery v. Viall*, 5 H. & N. 288 (1860).

third parties, save in exceptional circumstances. (3) In the case of a bargain and sale, the subsequent gain¹ or loss² belongs to the buyer; while under a contract to sell, until title has passed from him, the goods are at his risk, unless this rule is varied by the agreement of the parties.

§ 2. The Property in Chattels may pass without a Contract.

Although there is no true sale of a chattel without a contract between the seller and buyer, the general property therein may pass by operation of law; as where a person satisfies a judgment obtained against him for the value of goods which he had converted. Such a transfer is often spoken of as an involuntary sale. An early writer bases this doctrine on the two maxims, *Solutio pretii emptionis loco habetur*; *Quod remedio destituitur, ipsa re valet, si culpa absit*.³

Many of the older law-books contain *dicta* to the effect that title passes to the converter upon the recovery of judgment against him; but in *Brinsmead v. Harrison*,⁴ Willes, J., declared such was not the common-law rule; and, on appeal, the majority of the judges seem to have held the same opinion. This view was reaffirmed in *Ex parte Drake*,⁵ and prevails generally in the United States.⁶

¹ *Groat v. Gile*, 51 N. Y. 431 (1873).

² *Terry v. Wheeler*, 25 N. Y. 520 (1862).

³ *Jenkins*, Centuria Quarta, Case 88.

⁴ L. R. 6 C. P. 584 (1871); on appeal, 7 C. P. 547. It is here held that the doctrine that if two commit a tort, a judgment against one is of itself, without execution, a bar to an action against the other for the same cause, relates purely to procedure, and does not affect the question of title.

⁵ 5 Ch. D. 866 (1877). In this case James, L. J., said: "I think it is not the business of any court of justice to find facilities for enabling one man to steal another man's property."

⁶ *Miller v. Hyde*, 161 Mass. 472 (1894); *Burdick's Cases on Torts*, 448.

1. *Title relates back to Time of Conversion.* — Whether the title acquired in such a case relates back to the wrongful act appears not to have received judicial decision in England, and the text-writers are at variance.¹ In the United States the doctrine of relation is enforced. Accordingly, the offspring of converted animals, born intermediate the conversion and the satisfaction of the judgment, are the property of the judgment debtor;² and the owner of converted property, who retakes it after judgment and before satisfaction, is a trespasser, if thereafter he enforces the judgment.³

(a) *Reasons assigned for Doctrine of Relation.* — The reasons for this view were stated as follows by the Maryland Court of Appeals: "If the thing converted should from any cause, whether natural or artificial, be destroyed during the interval intervening between the period of conversion and the payment of the judgment, the loss must be sustained by the defendant; and it would seem to follow, that if the thing should improve in value during that period, the benefit ought to enure to the defendant, on the principle *qui sentit onus, sentire debet et commodum*. It must be borne in mind that the plaintiff, in an action of trover, compels the defendant to become a purchaser against his will; and from what period does he elect to consider the defendant as a purchaser, or as answerable to him for the value of the thing converted? He selects the date of conversion as the epoch of the defendant's responsibility, and claims from him the value of the property at that period, with interest to the time of taking the verdict. The inchoate right of the defendant, as a purchaser, must be considered as coeval with

¹ Cf. Addison on Torts (Am. ed., 1876), p. 442, and Chalmers' Sale of Goods Act (2d ed.), p. 8.

² Hepburn v. Sewell, 5 H. & J. (Md.) 211 (1821).

³ Smith v. Smith, 51 N. H. 571 (1872).

the period of conversion ; and this right being consummated by the judgment and its discharge, must, on legal and equitable principles, relate back to its commencement."

§ 3. The Subject-matter of a Sale.

It does not embrace every form of personal property, but is generally said to consist in goods. As the signification of this term has been extended in some directions,¹ while it has been narrowed in others,² by the Statute of Frauds, the provisions of that statute must be kept in mind and applied during the discussion of the present topic.

1. *In England.* — The Sale of Goods Act (§ 62) defines "goods" as "all chattels personal other than things in action and money," and all "emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale." Prior to the adoption of this statute it had been judicially declared that only those things which were the subjects of larceny at common law and susceptible of delivery could be the subject-matter of sale in its technical sense.³

(a) *Is Money a Proper Subject of Sale?* — Money, it has been said, should not be included in the term "goods," because it is ordinarily the price of the subject-matter of the contract.⁴ The Roman law appears to have treated the transfer of money for a money price as an exchange, and not as a sale.⁵ Among modern civilians, however, the view prevails that a contract for the transfer of title to money, whether to specific coins or to a round sum, will amount to sale, if the money is dealt with as a ware ;⁶ cer-

¹ Chalmers' Sale of Goods Act (2d ed.), p. 112.

² *Humble v. Mitchell*, 11 Ad. & E. 205 (1839).

³ *Colonial Bank v. Whinney*, 11 App. Cas. 426, 434 (1886).

⁴ Campbell on Sales (2d ed.), pp. 3, 4.

⁵ Moyle's Contract of Sale in the Civil Law, p. 24.

⁶ Windscheid's Lehrbuch des Pandektenrechts, § 385.

tain forms of money are constantly bought and sold as commodities, and even when these are not at a premium in the terms of other forms of legal tender, there seems to be no reason why they should not be the subject of a technical sale.¹

(b) *Are Choses in Action Goods?* — A chose in action, according to judicial decisions in England, is not the subject-matter of a sale within the words, “goods, wares, and merchandises,” in the Statute of Frauds, because it is incapable of delivery;² although it is included in “goods and chattels” under the Bankrupt Act.³ The term “chattels” is considered more comprehensive than “wares and merchandises,” and the Bankrupt Act does not provide for the acceptance and receipt of the subject-matter, and hence does not by implication limit the term to things capable of delivery.

2. *In Scotland.* — The term for goods in Scotland is “corporeal movables,” and the Sale of Goods Act is expressly limited to this kind of personal property (§ 62). Sales of incorporeal rights in Scotland are not prohibited by the statute. Accordingly, a chose in action or even a *spes*, or chance, is still the subject-matter of a sale in that country, although such a transaction is not governed by the Sale of Goods Act.⁴ A Scotch court has held that a contract to furnish eleven-horse power of the steam-power of a particular engine is a sale and not a lease.⁵

¹ *Fowler v. N. Y. Gold Exch. Bk.*, 67 N. Y. 138, 146 (1876). “It is not claimed that gold is to be distinguished in this transaction from any other commodity or article of commerce. It was treated by the parties as an article of merchandise, the subject of purchase and sale, and not as current coin, a part of the currency of the land.”

² *Humble v. Mitchell*, *supra*.

³ *Hornblower v. Proud*, 2 B. & Ald. 327 (1819).

⁴ *Brown's Sale of Goods*, p. 29.

⁵ *Clark v. Stewart*, 10 Sc. L. R. 152 (1872).

3. *In the United States.* (a) *Effect of Legislation.* — Here, as in England, the judicial interpretation of the term “goods” is generally found in cases under the Statute of Frauds. While the English statute has been the model for our State legislation on the subject, our law-makers have frequently changed its language,¹ so as to leave no doubt of their intention to extend the law of sales to every form of personal property. Even in the States which have adopted the exact words of the English statute, it is held generally that they include all choses in action or securities which are the subjects of common sale and barter, which have a market value, or which are intended to be transferable, and when transferred to convey the debts or claims evidenced by them in a visible and palpable form.² American judges have not hesitated to declare the construction put upon the statute by English courts narrow and forced.³

(b) *Different Judicial Views.* In some States, accounts, although not evidenced by anything having a visible or tangible form, have been treated as goods,⁴ and it has been asserted that “goods, wares, and merchandise” are equivalent to “personal property,” including whatever is not embraced in the phrase, “lands, tenements, and hereditaments.”⁵ The view generally entertained, however, is that a legal right of property, not evidenced by an instrument which is capable of delivery *in specie*, is not within the words, “goods, wares,

¹ In Conn., Fla., Oregon, Ia., Miss., “any personal property ;” in California, Col., N. Dak., S. Dak., Idaho, Minn., Mon., Neb., Nev., N. Y., Wy., “goods, chattels, or things in action ;” in Ind., N. J., S. C., Vt., Va., Wash., W. Va., “goods ;” in Ga., Me., Mass., Mich., Mo., N. H., “goods, wares, or merchandise.”

² *McCann v. Randall*, 147 Mass. 81 (1888).

³ *Tisdale v. Harris*, 20 Pick. 9, Shaw, Ch. J., p. 14 (1838).

⁴ *Walker v. Supple*, 54 Ga. 178 (1875).

⁵ *Greenwood v. Law*, 55 N. J. L. 168, 26 At. 134 (1892).

and merchandise." Hence the contract for the transfer of an interest in an invention, before letters patent are obtained,¹ or a bank account or other debt due the transferor² is not one for the sale of goods; nor is an agreement for the sale of a partner's share in a firm,³ although it is embraced by the words "goods, chattels, and things in action."⁴ These words also include a contract for the sale of an invention, as shown by a model.⁵

§ 4. Existing and Future Goods.

1. *At Law*. — In order that goods may be the subject of a bargain and sale, that is, of a present sale under which title passes to the purchaser at once by virtue of the contract, they must be in existence when the contract is made. "A man cannot grant or charge that which he hath not." Hence a contract for the present sale of goods, thereafter to be manufactured or acquired by the seller, can operate only as an agreement to sell. To this rule there seems to be no exception, at present, in England.⁶

(a) *Potential Existence*. — Benjamin cites⁷ *Grantham v. Hawley*⁸ for the proposition that "things which are the natural product or expected increase of something already belonging to the vendor" have a potential existence in contemplation of law, and may be the subject-matter of a

¹ *Somerby v. Buntin*, 118 Mass. 279 (1875); *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315; L. ed. 749 (1892).

² *N. Y. Biscuit Co. v. City of Cambridge*, 161 Mass. 326 (1894).

³ *Vincent v. Vieths*, 60 Mo. App. 9 (1894).

⁴ *Van Brocklin v. Smeallie*, 140 N. Y. 70 (1893).

⁵ *Jones v. Reynolds*, 120 N. Y. 213 (1890).

⁶ *Chalmers' Sale of Goods Act* (2d ed.), § 5; *Langton v. Higgins*, 4 H. & N. 402.

⁷ *Sales* (Am. ed. of 1892), p. 80.

⁸ *Hobart*, 132 (1603).

present sale. The doctrine of this case has been adopted in most of the United States, where it is held that the future offspring of the seller's animals,¹ or the products therefrom,² or the future crops from his land,³ or wages to be earned under an existing contract,⁴ may be the subject of present sale. In such a case, the grant is absolute and perfect, when made, vesting the property in the purchaser the moment it comes into existence, so that an attempted sale and transfer thereof to a second *bona fide* purchaser passes no title.⁵ In some jurisdictions there is a tendency to limit the decision in *Grantham v. Hawley* to the spontaneous products of the earth and to crops that have been planted before the contract is made.⁶

(b) *Chattel Mortgages on After Acquired Goods.* — Chattel mortgages frequently contain provisions that the mortgagor may dispose of the mortgaged articles, replacing them with goods which are to belong to the mortgagee. Such new articles are treated generally as future goods, and these provisions as agreements to sell and not as contracts of present sale. Some courts, however, interpret these clauses as establishing the relation of principal and agent between the mortgagee and mortgagor, and hold that the title to the new property, purchased with the proceeds of the old, vests at once in the mortgagee. Accordingly, if the mortgagor becomes bankrupt, and his assignee transfers such property to a *bona fide* purchaser, the latter does not acquire title.⁷

¹ *Hull v. Hull*, 48 Conn. 250 (1880).

² *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9 (1860).

³ *Briggs v. U. S.*, 143 U. S. 346 ; 12 Sup. Ct. 391 (1891).

⁴ *Manly v. Betzer*, 91 Ky. 596 ; 16 S. W. 464 (1891).

⁵ *McCarty v. Bleviss*, 5 Yerger, Tenn. 195 (1833).

⁶ *Rochester D. Co. v. Rasey*, 142 N. Y. 570 ; 37 N. E. 632 (1894) ; *Merch. Bk. v. Lovejoy*, 84 Wis. 601 ; 55 N. W. 108 (1893).

⁷ *Sawyer v. Long*, 86 Me. 541 ; 30 At. 111 (1894).

2. *In Equity*. — An agreement purporting to accomplish the present sale of future goods, is not dealt with in equity as at law. On the one hand, it is not treated as a mere contract to sell. On the other hand, it is not viewed as effecting a sale of the goods upon their acquisition by the vendor or mortgagor; notwithstanding the language of some distinguished judges.¹ It is construed as an agreement operating upon the goods, as soon as they are acquired, to the extent of creating a lien upon them,² or an equitable interest in them.³ The general property in the goods remains in the vendor, and he can transfer it to a second *bona fide* purchaser free from the lien or equitable interest of the first purchaser. In Massachusetts, provisions such as we have been considering become effectual in equity if the transferee takes and keeps possession of the property under the contracts, but not otherwise.⁴

3. *Sale of a Chance*. — In Scotch law, a contract purporting to effect the present sale of a chance, such as the cast of a net, operates as a present sale of the incorporeal thing.⁵ “Such a chance is a *res* in the wide jural sense of the word.”⁶ English law treats it as a contract for the sale of the subject of the chance, and unless falling under the ban of illegality because a wager, it will be enforced as an executory agreement, even though the chance produces nothing.⁷ As a present sale, it has no validity.⁸ What

¹ In *Holroyd v. Marshall*, 10 H. L. C. 191, Lord Chelmsford says: “At law, property non-existing, but to be acquired at a future time, is not assignable; in equity it is so.” See also *McCaffray v. Weedon*, 65 N. Y. 459, at p. 467 (1875).

² *Kribbs v. Alford*, 120 N. Y. 519; 24 N. E. 811 (1890).

³ *Joseph v. Lyons*, 15 Q. B. D. 280 (1884).

⁴ *Harriman v. Woburn El. L. Co.*, 163 Mass. 85; 39 N. E. 1004 (1895).

⁵ *Bell's Principles*, § 92.

⁶ *Mackintosh's Roman Law of Sale*, p. 25.

⁷ *Hitchcock v. Giddings*, 4 Price, 135, at 140 (1817); *Hanks v. Palling*, 6 E. & B. 659 (1856).

⁸ *Low v. Pell*, 108 Mass. 347 (1871).

appears to be a contract for the sale of a chance may be in reality an agreement for the hire of materials and labor.¹

4. *Goods which have perished.* — If the subject-matter of an agreement for the sale of specific goods has perished before the agreement is made, and this is unknown to the seller, no contract obligation ensues. It is deemed to have perished when it is so far destroyed that it ceases to answer the description of the thing sold.² The destruction of specific goods without the fault of either party, after the contract is made, but before title has passed to the buyer, avoids the contract. This is based on the principle that when the performance of a contract depends on the continued existence of a given thing, a condition is implied that the impossibility of performance arising from the destruction of the thing shall excuse the performance.³

§ 5. Contract for Sale, or for Labor and Materials.

An agreement to sell goods, to be made or acquired in the future, is not a wager, but a valid executory contract.⁴ To this extent the courts are agreed. There is judicial unanimity, also, in holding that if the contract relates to goods not necessarily to be produced or manufactured by the seller, it is one for the sale of goods, and not for labor and materials. If, however, by the express or implied terms of the contract, the seller is to expend labor upon the subject-matter of the agreement before it is in a deliverable state, the contract is treated by some courts as one for labor and materials and not for sale. The question has arisen, generally, under the Statute of Frauds.

¹ Mackintosh, *supra* ; Benjamin on Sales (Am. ed. 1892), p. 83.

² Couturier v. Hastie, 7 H. L. Cas. 673 (1856).

³ Dexter v. Norton, 47 N. Y. 62 (1871); Howell v. Coupland, 1 Q. B. D. 258 (1876).

⁴ Hibblewhite v. McMorine, 5 M. & W. 462 (1839); Clarke v. Foss, 7 Biss. 541, 552 (1878).

1. *Present Sale Test.* — In one of the earliest reported cases upon this point, the court held that a contract to make and deliver a chariot was not within the statute, “which relates only to contracts for the actual sale of goods, where the buyer is immediately answerable without time given him by special agreement, and the seller is to deliver the goods immediately.”¹ This view was followed, without hesitation, by a court consisting of Lord Mansfield and others, in deciding an action for the breach of an oral contract to deliver at a future time a load and a half of wheat which was unthreshed when the agreement was made.²

2. *Consideration Test.* — Twenty-five years later the reasons for these decisions were rejected, in an action for the breach of an oral contract to sell and deliver 3,000 sacks of flour at the seller’s mill, although the decisions were sustained on the ground that the contracts in those cases were for work and materials.³ It was admitted that the distinction between the case at bar and *Clayton v. Andrews* might seem a very nice one, “but still,” it was declared, “the work to be performed in thrashing made, though in a small degree, a part of the contract.” According to this view, the nature of the consideration furnished for the promise to pay, determined whether the contract was one for sale or for labor and materials.

3. *Test of Deliverability.* — A different test was announced in a case brought for not accepting a quantity of oak-pins to be cut out of slabs owned by plaintiff, and to be delivered to the defendant. “The subject of this contract did not exist *in rerum natura*; it was incapable of delivery and acceptance,” and hence not within the Statute of Frauds. “If the thing be capable of delivery, at the

¹ *Towers v. Osborne*, 1 Strange, 506 (1724).

² *Clayton v. Andrews*, 4 Burr. 2101 (1767).

³ *Rondeau v. Wyatt*, 2 H. Bl. 63 (1792).

time, why is it not delivered? But the same reason does not apply when the goods are not deliverable.”¹

4. *The Special Order Test.* — Soon after this decision, we find still another test suggested in an action brought for breach of contract to sell and deliver 100 sacks of flour, thereafter to be ground by the seller. Abbott, C. J., said: “In *Towers v. Osborne*, the chariot which was ordered to be made would never but for the order have had any existence. But here the plaintiffs were proceeding to grind the flour for the purpose of general sale, and sold this quantity to the defendant as part of their general stock. The distinction is, indeed, somewhat nice; but the case of *Towers v. Osborne* is an extreme case, and ought not to be carried further.”²

5. *Upon whose Materials is the Labor expended?* — A fifth test was enunciated in a suit brought for the price of certain machinery made by the plaintiff upon the special order of the defendant;³ and in an action for breach of contract to take and pay for a quantity of timber to be cut and put into a deliverable state by the plaintiff.⁴ It is stated in these terms by Bayley, J.: “If you employ another to work up his own materials in making a chattel . . . he cannot maintain an action for work and labor, because his labor was bestowed on his own materials, and for himself, and not for the person who employed him.”

6. *Essential Ingredient Test.* — Still another test was applied in a suit for the price agreed to be paid by the defendant to the plaintiff for printing a book written by the defendant. “The true criterion is, whether work is of the essence of the contract, or whether it is the materials supplied.”⁵

¹ *Groves v. Buck*, 3 M. & S. 178 (1814).

² *Garbutt v. Watson*, 5 B. & Ald. 613 (1822).

³ *Atkinson v. Bell*, 8 B. & C. 277 (1828).

⁴ *Smith v. Surman*, 9 B. & C. 561 (1829).

⁵ *Clay v. Yates*, 1 H. & N. 73 (1856).

7. *Present Test in England.* — None of the foregoing tests proved to be satisfactory. Later, in an action for the breach of contract to take and pay for two sets of artificial teeth, made by the plaintiff upon the special order of defendant's testatrix, the whole subject was carefully considered, and the conclusion reached that "if the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered."¹ The rejection of the old tests and the formulation of a new one were made easy for the English courts by Lord Tenterden's Act,² which extended the Statute of Frauds to contracts for the sale of goods which were not made, purchased, ready for delivery or to be delivered, when the contract was made.

"In reviewing these decisions," Mr. Benjamin remarks, "it is surprising to find that a rule so satisfactory and apparently so obvious . . . should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject."³ But in *Smith v. Surman*, *supra*, Littledale, J., said: "When the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials; that is a case within the statute. It is sufficient if, at the time of the completion of the contract, the subject-matter be goods, wares, and merchandise. I cannot assent to any case which has decided that such a contract is not within the statute."

¹ *Lee v. Griffin*, 1 B. & S. 272 (1861).

² 9 Geo. IV., ch. 14, § 7 (1828).

³ Benjamin on Sales (Bennett's ed. 1888), § 103.

8. *Diversity of View in the United States.* — The English cases have been abstracted thus carefully, because their divergent doctrines account for the conflict of judicial opinion on this topic in our various jurisdictions.

(a) *The Consideration Test*, employed in *Rondeau v. Wyatt* for the purpose of distinguishing *Clayton v. Andrews*, is applied in Maryland. As early as 1821, the Court of Appeals declared that “the distinction between mere contracts for the sale of goods, where work and labor is to be bestowed on them previous to delivery, and subjects are blended together, some of which are not in the contemplation of the statute, has too long prevailed to be at this day questioned.”¹ This test also received the sanction of the Minnesota Supreme Court in an early case,² but appears to have been rejected in a later decision which adopts the essential element test.³

(b) *The Test of Deliverability* won the approval of the South Carolina courts. “It is now the settled rule that when goods contracted for exist *in solido* and are capable of delivery at the time, it is within the statute; but where they are to be made, or something is to be done to put them in a condition to be delivered, according to the terms of the contract, it is not within the statute.”⁴

The Deliverability Test in New York. — This test is at the bottom of the New York rule, which declares the contract one for sale, if the subject-matter then exists *in solido*, although something is to be done to fit it for delivery. In the leading New York case on this point, the distinction stated in *Cooper v. Elston*,⁵ and approved in

¹ *Eichelburger v. McCauley*, 5 H. & J. 213, 215; followed in *Bagley v. Walker*, 78 Md. 239 (1893).

² *Phipps v. McFarlan*, 3 Minn. 109, 114, 115 (1859). The court's dislike of the Statute of Frauds appears on pp. 116, 117.

³ *Brown v. Sanborn*, 21 Minn. 402 (1875).

⁴ *Gadsden v. Lance, McMullan, Eq.*, 87, 91, 92 (1841).

⁵ 7 Term R. 14 (1796).

Groves *v.* Buck, “between a contract for a thing existing *in solido* and an agreement for a thing not yet made,” was spoken of as well settled;¹ and in a later case the consideration test is spoken of as absurd, and Clayton *v.* Andrews is declared to have been expressly overruled in England.²

Some of the later New York cases, it is true, lay particular emphasis on the special order test,³ which has been adopted in several jurisdictions.

(c) *Special Order Test.* — This test appears to have influenced Shaw, Ch. J.,⁴ in establishing the Massachusetts rule, — that a contract for the sale of articles then existing, or such as the vendor, in the ordinary course of his business, manufactures or procures for the general market, whether on hand or not, is one for sale; but a contract for goods to be manufactured especially for the purchaser, and upon his special order, and not for the general market, is one for labor and materials.⁵ The same test is at the bottom of the New Jersey rule.⁶

(d) *Upon whose Materials is Labor Expended.* — The test suggested by Bayley, J., in Smith *v.* Surman — upon whose materials the labor is to be expended — has commended itself to several State courts. In an action for breach of contract to deliver the whole of defendant’s crop of cotton for a certain year, the Supreme Court of Georgia⁷ said: “There really is but one exception to the operation of the statute, to wit, contracts for work and labor, and

¹ *Crookshank v. Burrell*, 18 Johns. 58 (1820).

² *Downs v. Ross*, 23 Wend. 270 (1840).

³ *Hinds v. Kellogg*, 37 N. Y. State Rep. 356; 133 N. Y. 536 (1892).

⁴ *Mixer v. Howarth*, 21 Pick. 205 (1839); *cf.* *Flint v. Corbett*, 6 Daly (N. Y.) 429 (1876).

⁵ *Goddard v. Binney*, 115 Mass. 450 (1874).

⁶ *Finney v. Apgar*, 31 N. J. L. 226, 270; and see *Puget Sound Depot v. Rigby*, 43 Pac. 39; 13 Wash. 264 (1895).

⁷ *Cason v. Cheely*, 6 Ga. 554, 560, 563 (1849).

this grows out of the palpable injustice of compelling a man by law in any case to lose the price of his labor. All cases which are not within the reason of this exception are not within the exception itself. . . . Whilst he (the plaintiff in error) was working and laboring to produce this cotton, 'he was working and laboring for himself and not for the defendants.' "

In an action for breach of contract to cut all butternut trees, on certain land of defendant, into logs and deliver them to plaintiffs, the Supreme Court of Vermont¹ expressly followed *Smith v. Surman*, saying, "The labor bestowed by the defendant was upon his own property, and was all done in the simple act of delivering it. He was not at work for the plaintiffs in any sense, but for himself."

(e) *The Essential Ingredient Test*. — Other State courts have preferred the essential ingredient test. In a leading case, the Supreme Court of Maine² held that a contract to furnish a quantity of hoe shanks, to be made in accordance with certain patterns supplied by the orderer, was not one of sale, saying: "A contract for the manufacture of an article differs from a contract of sale in this: the person ordering the article to be made is under no obligation to receive as good or even a better one of the like kind purchased from another and not made for him. It is the peculiar skill and labor of the other party, combined with the materials for which he contracted and to which he is entitled." This view seems to prevail in New Hampshire,³ where a contract for the sale of an article thereafter to be produced is treated as one for work and materials, if it appears "that the particular person who is to manufac-

¹ *Ellison v. Brigham*, 38 Vt. 64 (1865) ; *Atwater v. Hugh*, 29 Conn. 508 (1861), *accord*.

² *Hight v. Ripley*, 19 Me. 137 (1841).

³ *Pitkin v. Noyes*, 48 N. H. 294 (1869) ; *Prescott v. Locke*, 51 N. H. 94 (1871).

ture it, or the mode and manner or materials, enter into and make part of the contract."

(f) *Doctrine of Lee v. Griffin in the United States.*—Inasmuch as most of the State courts had committed themselves to one or other of the foregoing tests, before the decision of *Lee v. Griffin*, they have been unable to adopt its simple and satisfactory rule. Missouri is a notable exception.¹ This rule was clearly announced in an early Wisconsin case,² but was not necessary to its decision, and was rejected in a later case.³ It was rejected and criticised severely in a recent Vermont decision. After discussing it and the New York rule, the court declared its preference for the Massachusetts rule, under which "the test is, not the non-existence of the article at the time of the bargain as in New York, nor whether the contract will result in the sale of a chattel, as in England, but whether the goods are such as the vendor, in the ordinary course of business, manufactures or procures for the general market, or whether they are manufactured especially for the vendee, and on his special order, and not for the general market, and for which they are neither intended nor adapted." If the article is to be manufactured on the vendee's special order, the contract is not within the statute, this court declares, although the personal skill and labor of the contractor are not stipulated for. "It is sufficient if the work and labor requisite to such a contract are to be performed by the contractor, or by his procurement and at his expense."⁴ In not a few States, the established rule has been based upon more than one of the English tests.

¹ *Pratt v. Miller*, 109 Mo. 78 (1891); and see opinion in *Prescott v. Locke*, *supra*.

² *Hardell v. McClure*, 1 Chand. 271 (1849).

³ *Meincke v. Falk*, 55 Wis. 427 (1882).

⁴ *Forsyth v. Mann*, 68 Vt. 116; 34 At. 481 (1896).

9. *Ultimate Object of Contract must be the Transfer of Title to Goods.*—Even under the present English rule, if the contract has not for its ultimate object the transfer of the title to specific personal property, it is not one for a sale. Accordingly, an attorney who agrees to prepare a deed, does not make a contract for the sale of the paper or parchment on which his labor is expended; nor does a printer contract to sell the paper and binding of books to the author for whom he prepares them;¹ nor, it is submitted, does the hotel or restaurant-keeper contract to sell the viands which he places before his guest, pursuant to an agreement for a meal,² any more than a farrier sells the medicines which he supplies in connection with his professional attendance on horses.³

The dissenting opinion of Chief Justice Paxson, in *Commonwealth v. Miller*, deserves careful consideration. He “could find nothing in the facts to justify the conclusion that there was a sale of the oleomargarine. The individuals referred to entered the defendant’s place of business and ordered a meal. It was furnished, but oleomargarine formed no part of it. It is true there was some of that article on the table. They might have partaken of it, but they did not. When they left, they carried the oleomargarine away with them. This, in my opinion, they had no right to do. A guest at a hotel may satisfy his appetite when he goes to the table. He may partake of anything that is placed before him, but, after filling his stomach, he may not also fill his pockets and carry away the food he cannot eat. . . . If the proprietor of a hotel places a bottle of wine before his guests, who do not partake thereof, it cannot be said that it is a

¹ *Lee v. Griffin*, 1 B. & S. 272 (1861). Opinion of Blackburn, J.

² *Comm. v. Miller*, 131 Pa. St. 118; 18 At. 938 (1890), *contra*.

³ *Clark v. Mumford*, 3 Camp. 37 (1811).

sale of the wine, nor has the guest the right to carry it away. He might as well carry off the table furniture."

§ 6. Goods or an Interest in Land.

English law treats real and personal property as distinct species; and the rules governing their use, their transfer, and their descent or their distribution are quite different. This distinction is recognized but not defined by the Statute of Frauds. It is important, therefore, to note the tests which determine whether a particular contract is one for the sale of goods or of an interest in land.

1. *Minerals*. — Land extends indefinitely above and below the surface. It, therefore, includes all minerals while they are unsevered. But the ordinary use of mines results in detaching minerals from their natural bed, in transforming them into movables, and consequently in their treatment as goods. Hence a contract for the sale of mined or severed ore is one for the sale of a chattel and not for an interest in land;¹ and a contract for a partnership in opening and working a stone-quarry on the land of one of the partners is not one for an interest in land.² Under a contract by which the land-owner "bargains and sells the right of digging for lead ore on a certain range, for the sum of \$500, the receipt whereof is hereby acknowledged," the purchaser does not acquire an estate in the land, nor does he become the owner of any ores save those which he digs; and he cannot maintain replevin against the land-owner for ores dug by the latter in violation of the contract.³ A mining

¹ *Green v. Ashlem Iron Co.*, 62 Pa. St. 97 (1869); *cf. Forbes v. Gracey*, 94 U. S. 762.

² *Treat v. Hills*, 68 Wis. 344 (1887).

³ *Gillett v. Treganza*, 6 Wis. 343 (1858); *contra, Desloge v. Pearce*, 38 Mo. 588 (1866), that the right to enter and dig for ores is an incorporeal hereditament, as it gives the right to commit waste and to carry away a part of the realty.

claim is treated in the Pacific States as personal property, for the transfer of which a written conveyance is not necessary;¹ and is distinguished from a mine which is considered real property.²

2. *Ice*. — This, until severed, belongs to the owner of the soil under the water upon which it forms,³ and generally is deemed real property, because “connected with and in the nature of an accession to the land;”⁴ although a contract for the sale of ice already formed but unsevered has been held one for the sale of personal property.⁵ Said Campbell, Ch. J.: “In its frozen condition, it drew nothing from the land and got no more support from it than a log floating on water would have had. . . . It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. . . . It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think it should be dealt with in law according to its uses in fact, and that any sale of ice ready formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.”

3. *Soil Products*. — These, while attached to the earth, are within the general definition of real property, and they pass as a part of the land, without enumeration, by a deed from the exclusive owner and occupier. For most purposes, however, the common law treated certain land

¹ Union Con. Silver Co. *v.* Taylor, 100 U. S. 37 (1879).

² Hardenberg *v.* Bacon, 33 Cal. 356, 381 (1867).

³ Hoag *v.* Place, 93 Mich. 450 (1892); *cf.* Howe *v.* Andrews, 62 Conn. 398 (1892).

⁴ Wash. Ice Co. *v.* Shortall, 101 Ill. 46 (1881).

⁵ Higgins *v.* Kurterer, 41 Mich. 318 (1879).

products as personal and not as real property. These were called emblements or *fructus industriales*, and consisted of "such crops as in the ordinary course of things return the labor and expense bestowed upon them strictly within the year." A tenant at will, whose estate was determined by the landlord, or the representatives of a tenant for life, were allowed to enter and take such products as a "compensation for the labor and expense of tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which, being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give." The same doctrine was "extended to tenants in fee, principally for the benefit of their creditors."¹

(a) *Annual Crops*.—As the common law thus distinguished emblements from the land, devolving the former upon the personal representative and the latter upon the heir, subjecting one to seizure under an execution and not the other, — in short, treating one as goods for most purposes; and as the Statute of Frauds "takes things as it finds them, and provides for lands and goods, according as they were so esteemed before the enactment,"² a contract for the sale of this class of land products is treated generally as one for the sale of goods, and not of an interest in lands.³ It is to be borne in mind that this class includes only such crops as are produced within the current year by manurancie and industry.⁴

By the British Sale of Goods Act, not only emblements, but industrial growing crops are declared to be goods.

¹ 2 Blackstone's Commentaries, pp. 122, 146, 404.

² Dunne v. Ferguson, 1 Hayes (Irish), 542 (1832).

³ Evans v. Roberts, 5 B. & C. 829 (1826).

⁴ Rieff v. Rieff, 64 Pa. St. 134 (1890); *contra*, Whitmarsh v. Walker, 1 Met. (Mass.) 313 (1840).

The latter term is the Scotch equivalent of emblements, and was inserted in the statute because of that fact; but the suggestion is made by a Scotch writer that its presence in the statute may have disposed of a question which had not been settled by judicial decision in England, whether such products of the soil as madder, clover, teasels, which are not permanent products as trees, nor requiring annual cultivation like cereals, are goods.¹

(b) *Natural Soil Products*.—The natural and permanent produce of the soil, such as grass, trees with their fruits, and the like, before severance, was not treated as personalty by the common law, and a contract for its sale is, by the weight of judicial authority, deemed one for the transfer of an interest in lands.² If, by the agreement, however, the title to the produce is not to pass until it has been severed and thus converted into a chattel, the contract is one for the sale of goods.³ The modern English view seems to be that the natural growth of land may be the subject-matter of a present sale of goods, if it is not to derive further benefit from the soil;⁴ and this doctrine is held by a few of our State courts. The agreement of the parties that the produce shall be separated presently from the land, is treated as working its constructive severance.⁵

Even in those jurisdictions where the subject-matter of a contract for the present sale of natural produce is deemed an interest in land, it is held generally that if the vendee severs the growth before the vendor's repudiation of the contract, he acquires title to it as a chattel.⁶ In

¹ Brown on Sales, p. 286.

² Green v. Armstrong, 1 Denio (N. Y.), 552 (1845); Hirth v. Graham, 50 Ohio St. 57; 33 N. E. 90 (1893).

³ Killman v. Howlett, 48 N. Y. 569 (1872).

⁴ Marshall v. Green, 1 C. P. D. 35 (1875).

⁵ Byasse v. Reese, 4 Metc. (Ky.) 372; 83 Am. Dec. 481 (1863).

⁶ Owens v. Lewis, 46 Ind. 488 (1874); but see Bent v. Hoxie, 92 Wis. ; 64 N. W. R. 426 (1895).

two States the broad ground is taken, that if the contract is to eventuate merely in the transfer of title to a chattel, it is one for the sale of goods, whether the natural growth is to derive further benefit from the soil or not, and whether it is to be severed from the land by the vendor or the vendee.¹ Said the court, in the case last cited: "The circumstance that the produce purchased may, or probably, or certainly will, derive nourishment from the soil between the time of the contract and the time of the delivery, is not conclusive as to the operation of the statute. If the contract, when executed, is to convey to the purchaser a mere chattel, though it may be in the *interim* a part of the realty, it is not affected by the statute; but if the contract is, in the *interim*, to confer upon the purchaser an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it is affected by the statute, and must be in writing, although the purchaser is at the last to take from the land only a chattel. . . . It would be a perversion of the objects of the statute to hold as invalid the sale, in other respects legal, of the growing crop of peaches, with no intent of the parties to sell or purchase the soil, but affording a mere license, express or implied, to the purchaser to go upon the land, to gather the fruit and remove the same."

4. *Fixtures*. — In England, the maxim, *quod plantatur solo, solo cedit*, is applied strictly, almost harshly. Accordingly, buildings, or other structures,² originally intended as permanent accessions to the land, although at the time of the contract doomed to removal,³ machinery,⁴

¹ *Bostwick v. Leach*, 3 Day (Conn.), 476 (1821); *Turner v. Piercy*, 40 Md. 212, 224, 225 (1874).

² *Firrest v. Greenwich*, 8 E. & B. 890 (1858).

³ *Lavery v. Pursell*, 39 Ch. D. 508 (1888).

⁴ *Walmesley v. Milne*, 7 C. B. N. S. 115 (1859).

and house decorations¹ affixed in a permanent manner to the building, are treated as real estate. So are gold, silver, and other metals which have become so imbedded in the bricks of a smelting furnace that they cannot be removed without pulling down the furnace or breaking up some of the brick.² As between the life tenant and remainder man, also between the landlord and tenant, this rule has been relaxed "for the benefit of the public, to encourage tenants for life to do what is advantageous to the estate during their term,"³ and "for the benefit of trade."⁴ Still, trade fixtures appear to be treated in England not as goods, and a contract for their sale transfers only the right to sever them.⁵

(a) *Trade Fixtures in the United States.*—In the United States, however, the maxim is applied less rigorously. Trade fixtures are not only favored, but the law deals with them as chattels.⁶ Accordingly, stone piers, built by a railroad company as a part of its equipment, are to be treated as personalty upon the abandonment of the road, for the reason that articles merely accessory to a business carried on upon land, and not intended as permanent accessions to the land, "retain the personal character of the principal to which they belong, and are subservient."⁷ It has been judicially declared that in "applying the Statute of Frauds, buildings are not classed with forest trees, but with growing crops, nursery trees, and fixtures attached to realty. And buildings are realty

¹ *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382 (1866).

² *Tottenham v. Swansea Zinc Ore Co.*, 52 L. T. 738 (1885).

³ *Lawton v. Lawton*, 3 Atk. 14 (1743).

⁴ *Sanders v. Davis*, 15 Q. B. D. 268 (1885).

⁵ *Lee v. Gaskell*, 1 Q. B. D. 700, 701 (1876).

⁶ *Russell v. Richards*, 10 Me. 429 (1833); *Strong v. Doyle*, 110 Mass. 92 (1872).

⁷ *Wagner v. Cleveland & Toledo Railway*, 22 Ohio St. 563, 577, 578 (1853).

or personalty, according to the intention of the parties. And when the parties in interest agree that they may be severed and moved from the realty, buildings are held and treated as personalty.”¹ In most jurisdictions, however, the parties cannot by an oral contract convert a building from real property into a chattel. Hence, if the land and the building are owned by the same person, an oral reservation of the building by the owner when conveying the land by deed is inoperative; ² and a contract for the sale of the unsevered materials of a ruined building is one for the transfer of an interest in land, and not for the sale of chattels.³

5. *Contract for Sale of Land and Goods.*—A single contract for the sale of chattels, and for the transfer of an interest in land, is not one for the sale of goods; and unless in writing is void *in toto*.⁴ The law of Louisiana treats as “part of the immovable” those things that have been added by the owner for the improvement and service of the property, such as cattle used in the cultivation of land, implements of husbandry, seeds, beehives, mills, kettles, and machinery, and all movables attached to a building by the owner with plaster or moisture. Nevertheless, it permits the unpaid vendor to enforce his privilege on the movable sold, even as against a mortgagee of the vendee.⁵

§ 7. The Property.

In order that a contract be one for the sale of goods, it must have for its object the transfer of the general

¹ Long v. White, 42 Ohio St. 59 (1884).

² Noble v. Bosworth, 19 Pick. (Mass.) 314 (1837); Leonard v. Clough, 133 N. Y. 292 (1893).

³ Meyers v. Schemp, 67 Ill. 469 (1873).

⁴ Thayer v. Rock, 13 Wend. 53 (1834).

⁵ Baldwin v. Young, 47 La. Ann. 1466; 17 So. R. 883 (1895).

property as distinguished from a special property therein.¹ The purchaser becomes the general owner of the goods, with untrammelled power to dispose of such ownership.

1. *A Sale differs from a Mortgage.*—The buyer's rights are clearly distinguishable from those of a mortgagee of goods, who, at common law, is the transferee of the general property therein, but with his ownership subject to defeasance by the mortgagor's performance of the mortgage conditions.² Even if the conditions are not performed, and the mortgagee's title becomes absolute at law, it is subject still to an equity of redemption.³

2. *A Sale differs from a Pledge.*—His rights differ even more widely from those of a pledgee, who acquires only a special property in the goods.⁴ The pledgor remains the owner of the general property therein, and may sell it subject to the pledgee's interest. Such purchaser, even after default in paying the loan for which the goods are pledged, may maintain trover for them, if the pledgee refuses to deliver them to him upon his tender of the debt.⁵ Moreover, a change of possession is necessary to the validity of a pledge, but not to the validity of a sale or a mortgage at common law.⁶

3. *A Sale differs from a Lien.*—Still broader is the distinction between the rights of a purchaser of goods and those of a lienor. The latter has a personal right to hold

¹ Sewell v. Burdick, 10 App. Cas. 74 (1884). See definition of general ownership by Folger, J., in *Farmers' Bank v. Logan*, 74 N. Y. 568, at p. 581 (1878).

² Brown v. Bement, 8 Johns. (N. Y.) 96 (1811).

³ Putchin v. Pierce, 12 Wend. 61 (1834).

⁴ Cortelyou v. Lansing, 2 Caines Cases, 200 (1805).

⁵ Franklin v. Neate, 13 M. & W. 481 (1844).

⁶ Parshall v. Egert, 54 N. Y. 18 (1873); *Ex parte Hubbard*, 17 Q. B. D. 690, 697, 698, Bowen, L. J. (1886).

the goods, but has no authority to sell them, nor to transfer his right of possession.¹

4. *Application of Foregoing Rules.* — While the legal distinction between a pledge, a lease, a consignment, or other bailment on the one hand, and a sale or an exchange on the other, is clear and unquestioned,² its application to a concrete case is often difficult.³ In determining whether a particular transaction is a bailment or a sale, we must look to its substance rather than to its form. If it gives to one party all the rights which a vendor can legally claim, and confers upon the other all the rights which a purchaser can legally demand, it is a sale, no matter what name the parties may have applied to it.⁴ On the other hand, if it is in form a hiring of the goods, and gives to the hirer no proprietary right in them, and no lien or interest of any sort beyond the right to keep and use them for a stipulated time, it is not a sale, nor a contract to sell, although the lessor binds himself to sell upon the final payment of rent, and the hirer has the option to purchase by making the rent payments agreed upon. It is an agreement of hiring only, with an option to the hirer to become a purchaser.⁵

However, if the transaction assumes the form of a lease, with a proviso for a sale, for the purpose of evading stat-

¹ *Donald v. Suckling*, L. R. 1 Q. B. 585, 612 (1866); *Schofield v. National El. Co.*, 67 N. W. 645, Minn. (1896).

² *Smith v. Clark*, 21 Wend. 83 (1839); *The South Australian Ins. Co. v. Randall*, L. R. 3 P. C. 101 (1869).

³ *Crosby v. Delaware & Hudson Can. Co.*, 119 N. Y. 334; 128 N. Y. 641 (1891); *Brown v. John Church Co.*, 53 Ill. App. 615 (1894); *The Peoria Manufacturing Co. v. Lyons*, 153 Ill. 427 (1894).

⁴ *Hutton v. Lippert*, 8 App. Cas. 309 (1883).

⁵ *Rowe v. Sharp*, 51 Pa. St. 26 (1865); *Brown v. Billington*, 163 Pa. St. 76; 29 At. 904 (1894); *Helby v. Matthews* (1895), App. Cas. 471; 11 Rep. 1, distinguishing *Lee v. Butler* (1893), 2 Q. B. 318; 4 Rep. 563.

utes which require conditional sales or chattel mortgages to be registered, or if it is opposed to the policy of the local law which prohibits secret liens, the courts will refuse to treat it as a bailment, and will declare it a sale or a mortgage, according to the facts.¹

The English statute expressly provides that its provisions "relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security."²

§ 8. The Price.

The payment of a money consideration or price, or an agreement therefor, is necessary to a sale of goods. This element distinguishes it from a gift. But the two transactions differ in other respects. In a present sale delivery of the property is not necessary to pass title; while a gift of a specific chattel by words *in presenti* will not pass title without delivery;³ although the delivery may precede the words of gift.⁴ Again, if a gift leaves the donor insolvent, it may be avoided by existing creditors without proof that it was made with intent to defraud them, while a sale can be impeached by creditors only upon such proof.⁵

1. *Sale or Barter*. — A money consideration also distinguishes a sale from a barter. It has been said that

¹ Greer v. Church & Co., 13 Bush (Ky.), 430 (1877); Heyford v. Davis, 102 U. S. 235 (1880); Gross v. Jordan, 83 Me. 380 (1891); Comm. v. Harmel, 166 Pa. St. 89; 30 At. 1036 (1895).

² Sale of Goods Act, 1893, § 61 (4).

³ Noble v. Smith, 2 Johns. (N. Y.) 52 (1806); Cochrane v. Moore, 25 Ch. D. 57 (1883). But see Shaffer v. Stevens, 42 N. E. 620, Ind. (1896).

⁴ Wing v. Merchant, 57 Me. 383 (1869); Kilpin v. Ratley, 1 Q. B. 582 (1892).

⁵ Ruhl v. Phillips, 48 N. Y. 125; 8 Am. R. 522 (1871); Davis v. Schwartz, 155 U. S. 631; Book 39, L. ed. 289; 15 Sup. Ct. 237 (1895).

when a statute refers in terms to contracts of sale, it has no application to contracts of exchange,¹ and this view has prevailed with some courts,² but not with others.³ Under the common-law system of pleading and practice, it was error to describe an agreement to exchange goods as a sale, or to sue in debt instead of for a breach of contract.⁴ Again, as a power of sale under a statute, a decree, a deed, or authority of any kind, is strictly construed, the possessor of such a power has no authority to exchange or barter the property.⁵ But for most purposes the rules applicable to exchange are the same as those governing sales.⁶ Not infrequently, judicial opinions use the terms interchangeably.⁷

2. *If Price is not stipulated.* — In English law, it is not necessary to the validity of a contract to sell, nor of a present sale, that the price should have been expressly fixed by the parties. It is enough if the price can be inferred from their previous dealings, or if it is to depend on a

¹ Chalmers' Sale of Goods Act (2d ed.), p. 4.

² *Massey v. State*, 74 Ind. 368 (Intoxicating Liquor Statute) (1881).

³ *Howard v. Harris*, 90 Mass. 297 (Intoxicating Liquor Statute) (1864); *Dowling v. McKenney*, 124 Mass. 478 (Statute of Frauds) (1878).

⁴ *Mitchell v. Gill*, 12 N. H. 390 (1841); *Beirne v. Dunlap*, 8 Leigh (Va.), 514 (1837); *Slayton v. McDonald*, 73 Me. 50 (1881).

⁵ *Williamson v. Berry*, 8 How. 495, 544 (1850); *Edwards v. Cottrell*, 43 Ia. 194 (1876).

⁶ Anonymous, 3 Salk. 157 (1692); *Emanuel v. Dane*, 3 Camp. 299 (warranty) (1812); *La Neuville v. Nourse*, 3 Camp. 351 (*caveat emptor*) (1813); *Hudson Iron Co. v. Alger*, 54 N. Y. 173 (revenue law) (1874); *First Nat. Bank v. Reno*, 73 Ia. 145 (title passing without delivery) (1887).

⁷ *Sturm v. Baker*, 150 U. S. 312, 329, 330; 14 Sup. Ct. R. 99, 104 (1893). "When there is no obligation to return the specific article, and the receiver is at liberty to return another thing of value, he becomes a debtor to make the return, and the title to the property is changed. The transaction is a sale."

future event ;¹ or if it can be made certain as by reference to a price current at a specified time and place,² or by reference to the price of gold on a given day,³ or by the verdict of a jury,⁴ or by the valuation of a third party.⁵ In the last case, if the chosen arbiter does not appraise the property, the contract to sell should be deemed avoided, inasmuch as it was conditioned upon his performance of the stipulated act ;⁶ but if the purchaser has appropriated any of the goods, under such a contract, he is liable for a reasonable price ;⁷ and if the failure of the arbiter to act is due to the fault of either party, he is liable in damages to the other.⁸ This topic is discussed more fully in a later chapter.

3. *Reasonable Price.* — Reasonable price is generally the market price. Such is not the case, however, if the latter is abnormal, as in case of a speculative corner,⁹ or of a trust combination ;¹⁰ nor if there is no market at the place of delivery.¹¹

The Supreme Court of Michigan has declared¹⁰ that a price fixed by a trust combination is unlawfully fixed, and “ the fact that they, the manufacturers, deemed the price

¹ Newell v. Smith, 53 Conn. 72 (1884).

² McConnell v. Hughes, 29 Wis. 537 (1872).

³ Ames v. Quimby, 96 U. S. 324 (1877).

⁴ Shealy v. Edwards, 73 Ala. 175 (1882).

⁵ New England T. Co. v. Abbott, 162 Mass. 148 (1894).

⁶ Sale of Goods Act, § 9 ; *contra*, Phippen v. Stickney, 3 Met. (Mass.) 384 (1841).

⁷ Clarke v. Westrope, 18 C. B. 765 ; 25 L. J. C. P. 287 (1856) ; Stone v. Heissler, 120 Ill. 433, 443, 444 (1887).

⁸ Sale of Goods Act, § 9 (2) ; *cf.* Humaston v. Am. Tel. Co., 20 Wall. 20 (1873).

⁹ Kouutz v. Kirkpatrick, 72 Pa. St. 376 (1872).

¹⁰ Lovejoy v. Michels, 88 Mich. 15, 23, 24 ; 49 N. W. 901 ; 45 A. L. J. 8 (1891).

¹¹ Dunkirk Colliery Co. v. Lever, 9 Ch. D. 20, 25 ; 41 L. T. N. S. 633 (1878).

fixed to be reasonable, does not purge it of its unlawful character. Independently of its "unlawful character, "a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as a market price. It is not a market price within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents and retain its character. Associations of this character give the buyer no voice, and close the market against competition."

§ 9. Price and Part Payment under the Statute of Frauds.

A contract for the sale of goods is not within the statute, unless the price or money consideration reaches a certain limit, — £10 in England, \$30 to \$300 in the United States. If the price is fixed by the express agreement of the parties, there is no difficulty in determining whether the statute applies. In other cases, however, the question is not so simple.

1. *Several Articles bought at one Interview.* — It may happen that several articles are sold by A. and bought by B. during a single interview, and that the agreed price for each article is below the limit, while the aggregate price exceeds it. Whether the statute applies depends upon the severability of the transaction, as disclosed by the facts in each case. If one person bargains with another for various articles which are separately selected and agreed upon, and asks that one statement of the whole be rendered, there is but a single contract.¹ Even in the case of auction sales, the parties may convert into a single contract what

¹ Baldy v. Parker, 2 B. & C. 37 (1823); Allard v. Greasert, 61 N. Y. 1 (1874).

would otherwise be distinct transactions ;¹ but where the parties contract for articles of different kinds, which are to be delivered and paid for at distinct times, places, and prices, the transaction is severable.²

2. *Uncertainty of Aggregate Sum.* — Even where the sale contract is entire, the aggregate sum to be paid may be unknown and ascertainable only in the future ; as where a crop of grain or of fruit is sold at a stipulated price per bushel, or the offspring sired by a certain animal during a designated period are bargained for at a fixed price per head.³ Whether such a contract is within the statute depends upon the sequel.

Again, an indivisible contract may embrace a sale of goods and a distinct undertaking, such as the transportation of the goods, or the agistment of animals. In that event, if the price of the goods, whether separately agreed upon or not, exceeds the limit, the whole contract is under the statutory ban.⁴

3. *Earnest and Part Payment.* — The statute is satisfied if the buyer gives “something in earnest to bind the bargain or in part of payment.” In early English law, earnest was “a distinct payment for the seller’s forbearance to sell or deliver a thing to any one else.”⁵ It has a different meaning in the Statute of Frauds, although its present signification is a matter of disagreement between the courts of England and those of the United States. According to the view of the former it “is money or a

¹ *Mills v. Hunt*, 20 Wend. (N. Y.) 431 (1838) ; *Jennett v. Wendell*, 51 N. H. 63 (1871).

² *Aldrich v. Pyatt*, 64 Barb. (N. Y.) 391 (1872) ; *cf.* *Tipton v. Feitner*, 20 N. Y. 423 (1859).

³ *Carpenter v. Galloway*, 73 Ind. 418 (1881).

⁴ *Harman v. Reeve*, 25 L. J. C. P. 257 (1856) ; *Irvine v. Stone*, 6 Cush. (Mass.) 508 (1852).

⁵ *Pollock and Maitland’s History of English Law*, vol. 2, p. 206 ; *cf.* *Moyle’s Contract of Sale in the Civil Law*, 48, 172.

valuable thing, not forming part of the price of the goods sold, and given by the buyer to the seller, and accepted by the seller, in order to mark the assent of both parties to the agreement.”¹

In this country the term is understood to be synonymous with part payment. What is given must be delivered and accepted as a part of the price,² and not simply as evidence that the parties are in earnest.³ Accordingly, if the parties make a deposit which is to belong to the one who is ready to perform if the other neglects performance, the deposit does not satisfy the statutory requirement of earnest or part payment.⁴ It is not necessary that legal tender money be used. Part payment may be made “in money or property, or in the discharge of an existing debt, in whole or in part. . . . A mere agreement to apply the purchase-money to either of these objects would not be enough, because the contract would still rest in words, and nothing more.”⁵

The New York statute requires part payment to be made *at the time* of the contract. “It is in substance held that payment subsequently made, although conforming to the oral agreement, is insufficient of itself to make the prior oral agreement valid. There must be enough in addition to the act of payment to show that the terms of the prior oral contract were then in the minds of the parties, and were reaffirmed by them; and this being shown, a cause of action arises, not on the prior oral

¹ 1 Law Quar. Rev., p. 17; *cf.* *Howe v. Smith*, 27 Ch. D. 89, 102 (1884). In Scotland it is sometimes called “*dead earnest*” to distinguish it from part payment. Brown’s Sale of Goods Act, 26.

² *Edgerton v. Hodge*, 41 Vt. 67 (1869).

³ *Hudmet v. Weir*, 100 Ind. 501 (1884); 115 Ind. 525 (1888).

⁴ *Howe v. Hayward*, 108 Mass. 54 (1871). The statutes of some States omit the term “earnest.” It is retained in Massachusetts.

⁵ *Brabin v. Hyde*, 32 N. Y. 519 (1865).

contract, but on the new contract made at the time of the payment.”¹

§ 10. The Form of the Contract.

1. *Nature of the Memorandum.*—The common law prescribed no requirements of form for the contract of sale. It was equally valid and enforceable, whether oral or written. But by the Statute of Frauds, in the absence of part payment, or of acceptance and receipt of part of the goods, the only evidence receivable to establish the contract, in an action for its enforcement, is a note or memorandum in writing, signed by the party to be charged or his duly authorized agent. However, the statute does not make this form essential to the validity of the contract,² but to its enforceability against the party pleading the statute.³

(a) *Memorandum not a Written Contract.*—Moreover, such a note or memorandum is not a written contract. When the parties freely and deliberately embody their sale agreement in a written instrument, they satisfy the statute, indeed; but they do more. They make the writing the best evidence of the terms of the contract, and they preclude each other from giving oral evidence to vary its provisions. On the other hand, the statute presupposes an oral contract, which is not merged in the subsequent note or memorandum. Hence, although the statutory writing is made and signed by the party to be charged, it is not conclusive as to the terms of the contract actually agreed upon. It may be disregarded save as an explainable admission when part payment, or receipt and acceptance, is proved.⁴ It may be shown by

¹ *Jackson v. Tupper*, 101 N. Y. 515 (1886).

² *Bird v. Munroe*, 66 Me. 337 (1887).

³ *Crane v. Powell*, 139 N. Y. 379 (1893).

⁴ *Lockett v. Nicklin*, 2 Ex. 93; 19 L. J. Ex. 403 (1848).

oral evidence not to be a true memorandum of the contract, by reason of its containing terms not agreed to or omitting some stipulated term.¹

(b) *Terms of an Accurate Memorandum not to be Modified by Oral Evidence.* — When a true and sufficient memorandum has been made, an oral agreement to vary the contract thus noted is unavailable, either to defeat an action on the original contract² or to sustain one on the new agreement.³ An accepted performance of the new agreement, however, is a good defence to an action on the original contract by way of accord and satisfaction;⁴ and on principle, the mutual rescission of the contract, although oral, should be equally effective.⁵

2. *Physical Requisites of the Memorandum.* — While the note must be a writing, the statute is satisfied if the words are written with a lead pencil,⁶ or are printed,⁷ and the writing may consist in part of abbreviations, conventional signs, or initials.⁸ The statute does not require a formal instrument, nor a single document. The memorandum may be made up of several pieces of writing, if all are signed by the party to be charged;⁹ or if all were physically connected when any one was so signed;¹⁰ or if

¹ McLean v. Nicoll, 7 Jurist (N. S.), 999 (1861); Boardman v. Spooner, 13 Allen (Mass.), 353 (1866).

² Noble v. Ward, L. R. 1 Exch. 117; 2 *ibid.* 135 (1867). But see Macpherson v. Warner, 9 T. L. R. 397 (1893); 9 Law Quar. Rev. 366.

³ Clark v. Fey, 121 N. Y. 470 (1890).

⁴ Moore v. Campbell, 10 Exch. 323 (1854); Long v. Hartwell, 34 N. J. L. 116 (1870).

⁵ Blackburn on Sales (2d ed.), 118, 119.

⁶ Merritt v. Closson, 12 Johns. 102 (1815).

⁷ Saunderson v. Jackson, 2 B. & P. 238 (1800).

⁸ Phillimore v. Barry, 1 Camp. 513 (1808); Barry v. Coombe, 1 Pet. 640 (1828).

⁹ Thayer v. Luce, 22 Ohio St. 62 (1871).

¹⁰ Tallman v. Franklin, 14 N. Y. 584 (1856).

the signed writing refers to and identifies the unsigned papers.¹ English courts have declared that signed and unsigned documents relating to the same transaction may be connected by oral evidence.² Where the memorandum is in duplicate and each part is signed by one of the parties,³ or where the paper signed by each is the complement of the other and the two are delivered at the same time,⁴ they are to be construed as though they were a single instrument. A written offer signed by the party to be charged satisfies the statute, although the acceptance by the other party is oral, and although the acceptance is not concurrent with the tender of the offer.⁵

3. *Contents of the Memorandum.* — The statutory requirement of a written note has for its purpose the prevention of mistakes or falsehoods as to the terms of the bargain. It seems clear, therefore, that the writing should contain all of the terms. It should identify the parties and show the relationship of seller and buyer; it should identify the property bargained for;⁶ and it should specify the price and terms of payment, if these have been fixed by the parties, as well as all the terms of the contract. Upon the first and second points there is substantial agreement. The only difference of opinion relates to the question whether, if the writing does not disclose the seller, parol evidence is admissible to show which party was the owner of the property when the bargain was made.⁷

¹ Brown v. Whipple, 58 N. H. 229 (1877).

² Oliver v. Hunting, 44 Ch. D. 205 (1890). But see Potter v. Peters, 72 L. T. R. 624 (1895).

³ Lerned v. Wannemacher, 9 Allen, 412 (1864).

⁴ Peabody v. Speyers, 56 N. Y. 230 (1874).

⁵ Sanborn v. Flagler, 9 Allen, 474 (1864); Reuss v. Picksley, L. R. 1 Ex. 342. *Contra*, Coe v. Tough, 116 N. Y. 273 (1889).

⁶ Waterman v. Meigs, 4 Cush. (Mass.) 497 (1849); Doherty v. Hill, 144 Mass. 465 (1887); Macdonald v. Longbottom, 1 E. & E. 977.

⁷ Newell v. Radford, L. R. 3 C. P. 52 (1867); Frank v. Eltring-

(a) *Statement of Price.* — It is generally agreed that a memorandum is defective which does not state the price when that has been fixed by the parties; ¹ but whether the writing must contain all of the promises of the buyer and seller, or need contain only those of the party to be charged, is a question upon which the courts differ. In England it seems to be unsettled.² It is affected to some extent in this country by statutory provisions that the consideration must be stated, or that it need not be stated, in the memorandum.³ The prevailing view is, however, that the writing must contain all of the terms of the sale contract.⁴

4. *Intent with which Made.* — The memorandum need not be written with a view to satisfy the statute. It will bind the party signing it if it is put to any use by him, — for example, if he directs his book-keeper to lay it in the safe,⁵ or if he communicates it to a third party,⁶ or if he employs it as a repudiation of his obligation under the oral agreement,⁷ or as a request for release therefrom, or if he embodies it in a pleading.⁸ It is sometimes said that “an entry on the defendant’s own private books never communicated to any one” will suffice.⁹ The cases

ham, 65 Miss. 281 (1887). Such evidence appears to have for its sole object putting the court into the position of the parties when the informal and hasty memorandum was made.

¹ *Smith v. Stanton*, 15 Vt. 685 (1843). *Contra*, *Ellis v. Bray*, 79 Mo. 227 (1883).

² 1 Law Quar. Rev. 20; Campbell on Sales (2d ed.), 317, 318.

³ *Hayes v. Jackson*, 159 Mass. 451; 34 N. E. 683 (1893).

⁴ *Bacon v. Eccles*, 43 Wis. 227 (1877); *McMullen v. Halberg*, L. R. 6 Ir. 463 (1880); *Browne*, Statute of Frauds (2d ed.), §§ 384, 398.

⁵ *Drury v. Young*, 58 Md. 546 (1882).

⁶ *Moore v. Mountcastle*, 61 Mo. 424 (1875).

⁷ *Bexton v. Rust*, L. R. 7 Exch. 279.

⁸ *Jones v. Lloyd*, 117 Ill. 597.

⁹ Benjamin on Sales, Bennett’s note (6th ed.) 208.

cited do not bear out the statement, and the true doctrine seems to be that the memorandum must have been communicated to the plaintiff or to some third person.¹

5. *The Signature.* — This need not be at the end of the writing, unless subscription is expressly required, as in New York.² It may be at the top or in the body of the note; it may be by initials or by a mark, and it may be printed or written, provided it is shown to have been “intended to relate and refer to, and in fact does relate to, every part of the instrument.”³ The signature may be written before the memorandum is complete, and even before any part of it has been committed to paper; but in such a case the blanks must be filled up by an authorized agent, or the signature must be adopted as governing the completed instrument.⁴ It is not necessary that the signature be made for the purpose of satisfying the statute. The signer may intend not to be bound,⁵ or he may attach his name simply as a verification of the correctness of a record which contains the memorandum as one of its items.⁶ The signatures of both parties are not required. It is enough that the note is signed by the party to be charged. The memorandum is not the contract, but only evidence of its terms.⁷

6. *Signature by Agent.* — The statute treats a memorandum signed by a duly authorized agent as equally binding on the principal with one bearing his personal

¹ 1 Law Quar. Rev. 19 and cases cited; *Remington v. Linthicum*, 14 Pet. 84, 93 (1840).

² *James v. Patton*, 6 N. Y. 9 (1851).

³ *Caton v. Caton*, L. R. 2 H. L. 127, 143 (1867).

⁴ *Stewart v. Eddowes*, L. R. 9 C. P. 311 (1874); *Ulen v. Kittredge*, 7 Mass. 233 (1810); *cf.* *Blackburn on Sales* (2d ed.), 70.

⁵ *Johnson v. Dodgson*, 2 M. & W. 653 (1837).

⁶ *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314 (1877).

⁷ *Justice v. Lang*, 42 N. Y. 493 (1870). *Contra*, *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. R. 708 (1886).

signature. It will not be necessary to discuss the principles of Agency applicable to this provision.¹ A brief statement of the rules on this point will suffice. An agent authorized to make a contract of sale is authorized to bind his principal by a proper memorandum² if made during his agency.³ The signature of such an agent may be treated as that of his undisclosed principal,⁴ except for the purpose of discharging himself.⁵ An auctioneer is the authorized agent of both parties to make a memorandum at the time of the sale, but he cannot make it at a later time on behalf of the purchaser without special authority.⁶

7. *Brokers' Notes.* — A broker who negotiates an oral sale contract has apparent authority to make a memorandum on behalf of both buyer and seller. Unless required by statute, custom, or agreement, this need not be made in any particular place or form.⁷ It is said that in England "a precise and accurate broker, when he has made a contract, reduces the terms to writing, and delivers to each party a copy signed by him. The copy delivered to the seller is commonly called the sold note; that which he delivers to the buyer is generally called the bought note. Besides these, he makes an entry in his book."⁸

(a) *Broker's Entry is generally a Memorandum only.* — The broker's entry in writing may be more than a statutory memorandum; it may be a contract in writing, as when made in the presence of both parties and assented

¹ Huffcut on Agency, §§ 26, 111-114, 120-124.

² *Murphy v. Boese*, L. R. 10 Exch. 126 (1875).

³ *Elliot v. Barrett*, 144 Mass. 256 (1887).

⁴ *Williams v. Bacon*, 2 Gray (68 Mass.), 387 (1854).

⁵ *Calder v. Dobell*, L. R. 6 C. P. 486, 496, 497 (1871).

⁶ *Mews v. Carr*, 1 H. & C. 484 (1856); *Horton v. McCarty*, 53 Me. 394 (1866); *Price v. Durin*, 56 Barb. 647 (1868).

⁷ *Richey v. Garvey*, 10 Irish Law Reports, 544 (1847).

⁸ *Blackburn on Sales*, 2d Eng. ed., p. 84.

to by them as the contract.¹ Ordinarily his writing is a memorandum only. If he makes a book entry, and delivers bought and sold notes, and all are of the same tenor, and conform to the terms of the oral agreement, no difficulty ensues. Even though he makes no book entry, if the bought and sold notes agree, and are retained by the principals, there is no difficulty, for they furnish satisfactory evidence of the terms of the original contract,² or they prove that the parties have assented to the new terms therein stated.³

(b) *Where the Notes differ.* — If one note only is put in evidence, it warrants the inference that the other agrees with it,⁴ and satisfies the statute as against the party on whose behalf and with whose authority it was signed.⁵

Again, in case the broker does not make a book entry, and delivers bought and sold notes which differ in some material respect, but which are retained by the parties, if the note retained by the party to be charged is in accordance with the terms of the oral contract as counted on by the plaintiff, it should satisfy the statute, and there is authority to that effect.⁶ Notwithstanding some of the earlier decisions, a mere memorandum in the broker's book, signed by him, is not *the contract*; it is at most only evidence of the contract in cases where he has authority to make it.⁷ Accordingly, if he delivers properly signed bought and sold notes of the same tenor which are

¹ Durrell v. Evans, 1 H. & C. 174 (1862).

² Chapman v. Partridge, 5 Esp. 256 (1804).

³ Goom v. Aflalo, 6 B. & C. 117 (1826); Thornton v. Charles, 9 M. & W. 802 (1842).

⁴ Hawes v. Foster, 1 Mood. & Rob. 368, 371 (1834); Parton v. Crofts, 16 C. B. (N. S.) 11 (1864).

⁵ Thompson v. Gardiner, 1 C. P. D. 777 (1876).

⁶ Campbell on Sales, 2d ed., 567, 568, and cases cited.

⁷ Thornton v. Meux, M. & M. 44 (1827). See Campbell on Sales, 2d ed., 569, 570.

retained by the principals, but signs a book entry at variance with them, they will satisfy the statute, unless the defendant can show that the oral contract differs from the notes, and that he has not assented to the new terms stated in them.¹

In the United States it is said that bought and sold notes should be taken together for the purpose of deciding whether they constitute a sufficient memorandum.²

8. *When Made.* — The statute is silent on this subject, but the weight of authority favors the view that the memorandum must be made before a suit is brought to enforce the contract.³ There is high authority, however, for what appears to be the better doctrine, that, as the memorandum is only evidence of the sale, and not the sale contract, it is immaterial whether this evidence is obtained before or after the suit is brought.⁴

¹ Authorities cited above.

² *Bibb v. Allen*, 149 U. S. 481, 495 ; 13 Sup. Ct. 950 (1892).

³ *Lucas v. Dixon*, 22 Q. B. D. 357 (1889) ; *Bird v. Munroe*, 66 Me. 337 (1877).

⁴ *Remington v. Linthicum*, 14 Pet. 84, 92, Taney, C. J.

CHAPTER II.

BARGAIN AND SALE.

§ 1. Its Nature.

WE have seen that a contract of sale may operate as a present conveyance of the property in goods, even though delivery and payment are to take place in the future.¹ Such a transaction is known to the common law as a bargain and sale. It is often called an executed sale,² but this designation is not a happy one, for the engagements of neither party may be executed fully; and it appears to have induced confusion of thought and erroneous decisions.³

§ 2. The Goods must be Specific.

In order that a transaction amount to a bargain and sale, not only must the subject-matter be in existence, but it must consist in specific or ascertained goods. A contract to sell a horse or a picture from a number owned by the seller cannot operate as a bargain and sale. "No person can be said to own a horse or a picture unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him."⁴ Until the party having the right to designate the particular horse or picture exercises that right, the contract may be satisfied by the appropriation of any one of the various horses or pictures

¹ *Supra*, p. 2.

² *Beardsley v. Beardsley*, 138 U. S. 262; 11 Sup. Ct. 313 (1890).

³ *Supra*, p. 2.

⁴ *Kimberly v. Patchin*, 19 N. Y. 330, 333 (1859).

among which the choice is to be made ; and the law knows no such thing as a floating right of property which may attach itself to one chattel or another, according to the exigencies of the party having the right of choice.¹

1. *Contract for Sale of Part of Mass.* — To this extent all courts are agreed. But suppose the contract is for the sale and purchase of a designated quantity from a larger mass of goods of the same kind and quality, as of 1000 bushels of wheat, or 100 barrels of flour, can it take effect as a bargain and sale before the stipulated portion is severed from the mass? The English courts and those of some of our States answer in the negative, holding that until such severance no one can say which part of the mass the seller has agreed to deliver ; the subject-matter has no individuality, and the purchaser cannot bring detinue, because he cannot describe the particular thing.² Such, however, is not the prevailing view in this country. When goods “are sold, not by a description which refers to and distinguishes the particular thing, but in quantities which are ascertained by weight, measure, or count,” and “can be identified only in masses or quantities, and in that mode, therefore, are viewed in the contracts and dealings of men,” if the agreed “quantity and the general mass from which it is to be taken are specified, the subject-matter is thus ascertained, and it becomes a possible result for the title to pass.”³ All of

¹ *Scudder v. Worster*, 11 Cush. (65 Mass.), 573, 580 (1853).

² *Gillett v. Hill*, 2 Crompt. & M. 530 (1834) ; *Waldo v. Belcher*, 11 Iredell (N. C.), 609 (1850) ; *Com. Bank v. Gillett*, 90 Ind. 268 (1883) ; *Hutchinson v. Railway*, 59 N. H. 487 (1879). Even the English courts hold that such a contract confers upon the purchaser an insurable interest in the goods. *Stock v. Inglis*, L. R. 12 Q. B. 564 ; 10 App. Cas. 263 (1885).

³ *Kimberly v. Patchin*, 19 N. Y. 330, 333 (1859) ; *Hurff v. Hires*, 40 N. J. L. 581 ; *Brownfield v. Johnson*, 128 Pa. St. 267 ; 18 Atl. 543 (1889).

these conditions must concur. Hence, if the larger quantity is composed of parcels differing in quality,¹ or possessing distinct individuality,² or if the contract permits the agreed quantity to be taken from a particular mass or from any other of like kind,³ the transaction cannot operate as a bargain and sale.

2. *Title not Lost by Remingling an Appropriated Part with the Mass.*—Even in England it is admitted that if the vendor once appropriates a part of the mass to the contract, title to such ascertained part may vest at once in the purchaser, and cannot be divested by the vendor's mingling it again indistinguishably with the mass.⁴ In the case last cited, the assignee in bankruptcy of the seller was held liable in conversion to the purchaser for exercising dominion over the whole mass, although when it came to his possession, the part once appropriated to the contract had lost its identity. No one could tell what part of the mass was owned by the purchaser, and unquestionably the assignee could have escaped liability by tendering any seventy-eight quarters of wheat from the specified heap. If the purchaser can retain title to seventy-eight quarters of wheat after the seller has intermingled them with the bulk from which they had been separated, it is difficult to see why he cannot obtain title while so intermingled.⁵

3. *English Rule Modified by Usage of Warehousemen.*—Some courts, while adopting the English doctrine, have not hesitated to hold that the owner of grain which is in the possession of a warehouseman, may pass title to a part thereof by a delivery order to the purchaser, duly

¹ *Foot v. Marsh*, 51 N. Y. 288 (1873).

² *Hutchinson v. Hunter*, 7 Pa. St. 140, 146 (1847).

³ *Golder v. Ogden*, 15 Pa. St. 528 (1850).

⁴ *Aldridge v. Johnson*, 7 E. & B. 835 (1857).

⁵ *Kimberly v. Patchin*, 19 N. Y. at pp. 334, 335.

accepted by the bailee. This acceptance is deemed an appropriation to the use or credit of the purchaser, whereby the latter acquires "title, right of possession, and constructive possession of the grain so purchased."¹ Statutes have been passed in a few States supporting and extending this rule.²

4. *Title by Estoppel.* — Although the goods may not have been specified, the vendor or a bailee may estop himself to deny that title has passed.³ "There may be also a good title by estoppel to things which do not require any instrument to transfer them; as, for instance, goods: if an action is brought upon the ground that the property in goods has passed to the vendor of the plaintiff, and if that question depends upon whether a particular parcel of goods has been set apart and appropriated to the contract between the vendor of the plaintiff and the defendant, an admission by the defendant, the owner of goods, that there had been a setting apart of the goods would be effectual as against him to pass the property in the goods to the plaintiff's vendor."⁴

§ 3. Contract to sell may become a Bargain and Sale.

This transformation may occur without further act by either party, as where a chattel is delivered upon an agreement that the transferee shall pay a certain sum for it, if it is damaged while in his possession.⁵ More commonly it is caused by an agreed act of one of the parties, or by their concurrent acts, such as the despatch of the goods

¹ Keeler v. Goodwin, 111 Mass. 490 (1873).

² Mass. Pub. Statutes, c. 72, § 7; Minn. Gen. St. 1878, c. 124, §§ 13-20; Hall v. Pillsbury, 43 Minn. 33; 44 N. W. 673 (1890); Maine Rev. St. (4th Revision) p. 333, § 9.

³ Gillett v. Hill, 2 Crompt. & M. 530; Knights v. Wiffen, L. R. 5 Q. B. 660 (1870); Watts v. Hendry, 13 Fla. 523 (1870).

⁴ Simm v. Anglo Am. Tel. Co., 5 Q. B. D. 188, 215, 216 (1879).

⁵ Bianchi v. Nash, 1 M. & W. 545 (1836).

by the seller to the buyer,¹ or their inspection by a common agent,² or their designation by the seller and acceptance by the buyer,³ or their selection and appropriation by the buyer.⁴ This topic will be discussed more fully in the next chapter.

§ 4. The Contract must be Unconditional.

Even when the contract relates to specific goods, and the language is that of a present sale, it will not operate to pass title to the purchaser, if the parties intend that it shall not have that effect.⁵ An unequivocal statement of their intention is conclusive upon the parties. How far it is binding on third persons will be considered hereafter. If their intention has not been clearly expressed, it is to be ascertained from "the terms of the contract, the conduct of the parties, and the circumstances of the case."⁶

1. *Presumption that Contract for Specific Goods is one of Bargain and Sale.* — It is well settled that a contract for the sale of specific goods is *prima facie* a bargain and sale, immediately vesting the title to the goods in the purchaser and a right to the price in the seller.⁷ Nor is this presumption changed by the fact that the seller engages to deliver the property at a future time and a designated place;⁸ nor in England by the fact that it is a sale

¹ Fragano v. Long, 4 B. & C. 219 (1825).

² Whitcomb v. Whitney, 24 Mich. 486 (1872).

³ Rhodes v. Thwaites, 6 B. & C. 388 (1827).

⁴ Nash v. Rockford Veneer Co., 67 N. W. 111, Mich. (1896).

⁵ Platter v. Acker, 13 Ind. App. 417; 41 N. E. 832 (1895).

⁶ Sale of Goods Act, § 17 (2); Lingham v. Eggeleston, 27 Mich. 324 (1873); Kost v. Reilly, 62 Conn. 57 (1892).

⁷ Blackburn on Sales (2d ed.), 124, 171, 172; Thompson v. Brannin, 94 Ky. 490; 21 S. W. 1057 (1893); Van Broecklin v. Smeallie, 140 N. Y. at p. 72.

⁸ Terry v. Wheeler, 25 N. Y. 520 (1862); Penley v. Bessey, 87 Me. 530; 32 At. 879 (1895).

for cash,¹ except in the case of goods sold in a retail shop.²

2. *Is a Sale for Cash Conditional?* — But in this country there are numerous dicta and a few decisions to the effect that a present sale contract of specific goods "for cash" or "for ready money," is conditional, and that title does not pass unless the condition is performed or waived. In an early case the doctrine is stated in this form: "But if the sale be for money to be immediately paid, or to be paid upon delivery, payment of the price is a precedent condition of the sale, which suspends the completion of the contract until the condition is performed, and prevents the right of property from passing to the vendee, unless the vendor chooses to trust to the personal credit of the vendee. If credit be not given, this bargain is considered nothing more than a communication."³

This view is adopted by Chancellor Kent, who declares that "Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, and if the payment be not immediately made, the contract becomes void."⁴ It appears to be the law in some of the States.⁵

¹ Sale of Goods Act, § 18, Rule 1; Campbell's Sale of Goods (2d. ed.), 340; Blackburn, *supra*.

² *Bussey v. Bomett*, 9 M. & W. 312 (1842).

³ *Copland v. Bosquet*, 4 Wash. C. Ct. 588 (1826) (at six months, "payable in Philadelphia, or if his principal prefers cash, three per cent discount, acceptance to be perfectly satisfactory").

⁴ 2 Kent's Commentaries, 496, citing as authorities Comyns's Digest, tit. Agreement, B. 3, & Bell on Sales, Edin. (1844) 20, 21. Undoubt-

⁵ *Turner v. Moore*, 58 Vt. 455 (1886); *The Evansville Railway v. Erwin*, 84 Ind. 457; *Halt v. Mo. Pac. Ry.*, 50 Mo. App. 179 (1892); *Com. v. Devlin*, 141 Mass. 423 (1886). But see *Morse v. Sherman*, 106 Mass. 430 (1871), and *Haskins v. Warren*, 115 Mass. 514 (1874).

3. *Cash Sale is not Conditional in Most Jurisdictions.* — In most jurisdictions, however, a contract for the sale of specific goods for cash on delivery is treated as a bargain and sale, unless some other fact appears evincing an intention that the title as well as the possession shall not pass unless and until the price is paid.¹ This fact may be disclosed by evidence of the course of dealing between the parties, or of the conduct of the parties before delivery has taken place,² or of an option to the buyer to pay cash or to perform some express condition such as giving approved paper,³ or of a statement by the seller during the negotiations that the property shall not become the buyer's unless he pays cash.⁴ In most of the cases where cash sales have been spoken of as conditional, some such additional fact has appeared; or the question really at issue has been, not whether title had passed, but whether the buyer was entitled to possession.⁵

4. *Payment or Security may be a Condition of Title's Passing.* — A stipulation that the buyer shall immediately take out of circulation and redeliver to the seller bills out-

edly the Scotch law treats such a term as a suspensive condition. 1 Bell's Commentaries (9th ed.), § 103; and Comyns lays down the rule as stated by Kent; but the cases which he cites do not support it, although the decision in *Dyer*, 29 b, has a dictum that such is the rule in case of a cash sale in a retail shop. The case of *Cowper v. Andrews*, Hob. 39, 41, declares that if "I sell you my horse for ten pounds, you shall not take my horse except you pay me ten pounds," but contains no intimation that failure to pay immediately avoids the sale.

¹ *Rail v. Little Falls Lumber Co.*, 47 Minn. 422; 50 N. W. 471 (1891); *Phillips d. Moor*, 71 Me. 78 (1880); *Hayden v. Demets*, 53 N. Y. 426, 431 (1873); *Clark v. Greeley*, 62 N. H. 394 (1882).

² *Paul v. Reed*, 52 N. H. 136 (1872).

³ *Copland v. Bosquet*, *supra*; *Tyler v. Freeman*, 3 Cush. 261 (1849).

⁴ *The Evansville Ry. v. Erwin*, 84 Ind. 457 (1882).

⁵ *Hodgson v. Barrett*, 33 Ohio St. 63 (1877); *Johnson-Brinkhan Co. v. Cent. Bk.*, 116 Mo. 558; 38 Am. St. R. 615; 22 S. W. 813 (1893).

standing against the latter,¹ or that he shall give a chattel mortgage on the goods,² or that he shall give his negotiable paper for the goods,³ renders the contract conditional. "A negotiable security is more beneficial to the vendor than a sale on account; it gives him conclusive proof of his debt, and is more available for use by enabling him to raise money on it."³

5. *Sale upon Condition Subsequent.* — A condition subsequent does not alter the nature of a bargain and sale. Hence, a contract for the present sale of a specific chattel, with an option to the purchaser to return, passes the title subject to its defeasance by the buyer's exercise of his option.⁴

¹ Bishop v. Shillito, 2 B. & Ald. 329, note (a) (1819).

² Empire State Foundry Co. v. Grant, 114 N. Y. 40; 21 N. E. 49 (1889).

³ Whitney v. Eaton, 15 Gray (81 Mass.), 225 (1860).

⁴ Ray v. Thompson, 12 Cush. 281 (1853); Sturm v. Baker, 150 U. S. 312 (1893); Foley v. Felrath, 98 Ala. 176 (1892); Lynch v. Willford, 59 N. W. 311 (1894). But see Sale of Goods Act, § 18, Rule 4.

CHAPTER III.

CONTRACT TO SELL.

§ 1. Existing or Specific Goods.

WE have seen that a bargain and sale transfers the general property in goods to the buyer. On the other hand, a contract to sell goods, whether these are specific or general, does not operate to pass title, but contemplates its conveyance in the future. To which of these classes a particular agreement belongs, may or may not be clear from the language employed and the circumstances of the case. But even where the parties have failed to disclose their intention on this subject, if a litigation ensues, it must be decided. Accordingly, courts have found it necessary to adopt and adhere to certain rules in determining whether cases before them fall within one or the other of these classes, and if they belong to the second class, at what time title passes to the buyer. In England these rules have been codified.¹ In this country they are to be deduced in each jurisdiction from the decisions of its courts.² One of these rules was discussed in the preceding chapter; the others will now be considered.

1. *Goods to be made deliverable by the Seller.* — We have seen that a stipulation for the future delivery of specific goods does not raise a presumption that the parties intend to postpone the passing of title. Such a presumption is created, however, when the seller engages to do

¹ Sale of Goods Act, § 18.

² Except in a few States which have codified them.

something to the goods for the purpose of putting them into a deliverable state. The reason for this presumption has been stated as follows: "In general, it is for the benefit of the vendor that the property should pass; the risk of loss is thereby transferred to the purchaser, and as the vendor may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the vendor pure gain. It is, therefore, reasonable that where by the agreement the vendor is to do something before he can call upon the purchaser to accept the goods as corresponding to the agreement, the intention of the parties should be taken to be, that the vendor was to do this before he obtained the benefit of the transfer of the property."¹

Accordingly, if the seller, before the goods are deliverable, is under obligation to sever the trunks of certain trees,² or to fatten animals,³ or to gin, bale, and bag cotton,⁴ or to trim and paint a vehicle,⁵ or to finish the tanning of hides,⁶ or to put fish on flakes and further dry them,⁷ or to complete the burning of charcoal,⁸ or to pay off all charges or liens upon the goods,⁹ or to shell corn,¹⁰ the title will be deemed not to pass unless other facts appear showing that the parties intend that it should pass.

¹ Blackburn on Sales (2d ed.), 175.

² *Acraman v. Morris*, 8 C. B. 449 (1849).

³ *Rourke v. Bullens*, 8 Gray (Mass.), 549 (1857); *Restal v. Engemon*, 67 N. W. 1146 (1896), Minn.

⁴ *The Elgee Cotton Cases*, 22 Wall. 180 (1874).

⁵ *Halterline v. Rice*, 62 Barb. 593 (1863). But the parties may contract for the present sale of unfinished wagons and for their completion by the seller after the passing of title. *Paine v. Young*, 56 Md. 314.

⁶ *Pritchett v. Jones*, 4 Rawle (Pa.), 259 (1833).

⁷ *Foster v. Ropes*, 111 Mass. 10 (1872).

⁸ *Hall v. Huntley*, 21 Vt. 147.

⁹ *Malone v. Minn. Statue Co.*, 36 Minn. 325; 31 N. W. 170 (1887).

¹⁰ *Thompson v. Conover*, 36 N. J. L. 148 (1873).

(a) *Notice to Buyer that Goods are deliverable.* — The English statute requires that the buyer shall have notice that the goods have been put into a deliverable state before title shall pass, though the notice need not be given by the seller. The provision was added on a suggestion from Scotland that it was “inequitable that the buyer should be liable to undertake a risk of which he was ignorant.”¹

2. *Weighing, Measuring, or Testing by the Seller.* — When the contract binds the seller to do either of these acts, even though it is to be done for the sole purpose of ascertaining the price, the English statute declares that “the property does not pass until such act or thing be done, and the buyer has notice thereof.” This rule, except the provision as to notice, had been established by judicial decisions in England, although it had encountered serious opposition.² The suggestion that it was “somewhat hastily adopted from the civil law, without advert- ing to the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else,” is borne out by the opinions in the early English cases on the subject,³ and by the decisions in Louisiana based upon the civil code of that State.

Article 2456 declares that a sale is perfect and the property passes to the purchaser “as soon as there exists an agreement for the object and for the price thereof.” Article 2458 provides, “When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they be weighed, counted, or

¹ Brown’s Sale of Goods, 88.

² Blackburn on Sales (2d ed.), 174; *Martineau v. Kitching*, L. R., 7 Q. B. 436; *Cockburn*, C. J. (1872).

³ *Hanson v. Meyer*, 6 East, 614 (1805); *Withers v. Lyss*, 4 Camp. 237 (1815); *Simmons v. Swift*, 5 B. & C. 857 (1826).

measured." The price is not agreed upon and ascertained, if the contract is for the sale of all the corn in a specified elevator, estimated at six or eight thousand bushels at sixty-five cents a bushel. "Had the elevator taken fire, and the corn been consumed before it was weighed, defendant could not have sued for any specific sum as the ascertained price of the corn. . . . There can be no sale in lump except for a lumping price."¹

(a) *Weighing or Measuring to Identify the Goods.* — If the agreement is not for the sale of specific goods, and the weighing, measuring, or testing is to be done by the seller, for the purpose of identifying the subject-matter or of appropriating it to the contract, the intention of the parties that title is not to pass until such act is done seems to be fairly inferable. It is an act which the seller must do, before he can call on the buyer "to accept the goods as corresponding to the contract." In many of the cases which support the rule that where the seller is bound to weigh, measure, or test the goods, it is the presumed intention of the parties that such act shall be a condition precedent to title passing, the act was necessary not simply to arrive at the exact price for which suit could be brought, but to ascertain the subject-matter,² or to put the goods into a deliverable state.³

¹ *Peterkin v. Martin*, 30 La. An. 894 (1878) ; *cf.* *Abat v. Atkinson*, 21 La. An. 414 (1869) ; *Goodwyn v. Pritchard*, 10 La. An. 250 (1855).

² *Joyce v. Adams*, 8 N. Y. 291, 297 (1853) (259 bales of cotton, but not "the cotton stored at 296 Water St. Any other bales of cotton of the description specified would" have satisfied the contract). *Martin v. Hurlburt*, 9 Minn. 142 (1864) ("all logs cut by me . . . with the exception of 175,000 feet"). *Pike v. Vaughan*, 39 Wis. 499, 505, (a half million feet of logs fit for use). *Rosenthal v. Kahn Bros.*, 19 Ore. 571, 577 (1890) (2,900 cords of good, merchantable fir-wood four feet in length).

³ *Rugg v. Minet*, 11 East, 210 (casks of turpentine to be filled) ; *Frost v. Woodruff*, 54 Ill. 155 (1870) (wood to be chopped and piled) ;

(b) *Weighing or measuring to ascertain Sum to be paid.* — Where, however, specific goods are to be weighed, measured, or tested by the seller solely for the purpose of ascertaining the aggregate sum to be paid by the buyer, there seems to be no more reason for the inference that the parties intend title shall not pass at once¹ than where the seller is to deliver the goods at a specified time and place. This view is held in a number of States.²

However, the English rule is accepted generally by our courts; and in not a few jurisdictions the earlier form of the rule is maintained, that whether the weighing, measuring, or testing is to be done by the seller or by the buyer, if this is necessary to fix the aggregate sum to be paid, title will not pass until it is done, unless the parties disclose a different intention.³ Actual⁴ or “symbolical”⁵ delivery of the goods by the seller to the purchaser, before they are weighed, measured, or tested, is evidence of mutual intention that title shall pass at once.

Moreover, if the weighing, measuring, or testing has been done, the title will pass, although the mathematical computation necessary to the ascertainment of the sum

Lingham v. Eggelston, 27 Mich. 324 (culls to be separated from the better quality). Although *Kein v. Tupper*, 52 N. Y. 550 (1873), is frequently cited in support of this rule, the decision is based on the fact that the purchaser had not had an opportunity to compare the bulk with the sample; *Hamilton v. Gordon*, 22 Ore. 557, 560 (1892) (all my crop of wheat sacked in good merchantable sacks).

¹ Cf. *Burrows v. Whitaker*, 71 N. Y. 291, 296, 297 (1877).

² *Morgan v. Perkins*, 1 Jones' Law (N. C.), 171 (1853); *Farmers' Phosphate Co. v. Gill*, 69 Md. 537 (1888); 16 At. 214; *Sanger v. Waterbury*, 116 N. Y. 371; 22 N. E. 404 (1889).

³ *Barrett v. Goddard*, 3 Mason, 111 (1822); *Nicholson v. Taylor*, 31 Pa. St. 128 (1858); *Prescott v. Locke*, 51 N. H. 94 (1871).

⁴ *Cunningham v. Ashbrook*, 20 Mo. 553 (1855); *Scott v. Wells*, 6 W. & S. (Pa.) 357 (1843); *Burrows v. Whitaker*, 71 N. Y. 291.

⁵ *Macomber v. Parker*, 13 Pick. 175 (1832); *Leonard v. Davis*, 1 Black (U. S.), 476 (1861).

payable has not been made,¹ and although the data for such computation may be unknown to the purchaser.²

(c) *Destruction of Goods before Weighing or Measuring.* — It has been held that where the contract is to sell by weight, measure, or count, and the goods are destroyed before they have been weighed, measured, or counted, the seller cannot recover for goods bargained and sold, even though title has passed.³ In the case last cited, Bayley, J., said: "So here the contract made weighing necessary, for without that the price could not be ascertained. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to such a certain sum." Littledale, J., said: "The mere bargain would not suffice, because no specific price was fixed; nor could the plaintiff recover on a *quantum valebat*, for the contract was to pay by weight; and, therefore, until the commodity was weighed, there would be nothing to guide the jury in the amount of damages to be given." This is not the prevailing view. In such a case, "the seller may recover the price . . . by ascertaining the amount as nearly as you can."⁴

3. *Sale of Specific Goods on Approval.* — A contract of this nature is not a bargain and sale. It provides for the passing of title in the future, at the option of the purchaser. Under the English statute, title vests "(a) when the buyer signifies his approval or acceptance to the seller,

¹ Tansley v. Turner, 2 Bing. N. C. 151 (1835).

² Bradley v. Wheeler, 44 N. Y. 495 (1871). But see the English statute, § 18, Rule 3.

³ Simmons v. Swift, 5 B. & C. 857.

⁴ Martineau v. Kitching, L. R. 7 Q. B. 436 (1872), Blackburn, J.; Upson v. Holmes, 51 Conn. 500, 503 (1883); Gill v. Benjamin, 64 Wis. 362; 25 N. W. 445 (1885).

or does any other act adopting the transaction; (b) if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of a reasonable time. What is a reasonable time is a question of fact.”¹

The American decisions accord with these provisions in the main,² although there is some authority for the view that the retention of the goods beyond the agreed time for their return, without notice of rejection, does not vest title in the buyer of itself; that it is evidence only of acceptance by the purchaser.³ Mortgaging the goods is an “act adopting the transaction,” and changing it from a conditional contract to buy into a bargain and sale.⁴ Notifying the seller that the buyer will have the defects remedied at the former’s expense is an act of the same nature.⁵

(a) *Sale or Return*. — The English statute, following the decisions of England and Scotland, makes no distinction between a “sale or return,” and a sale on approval.⁶ In this country, however, the former is treated as a bargain and sale upon a condition subsequent.⁷

¹ Sale of Goods Act, § 18, Rule 4; *Moss v. Sweet*, 16 Q. B. 493 (1851).

² *Delamater v. Chappell*, 48 Md. 244 (1877); *Columbia Rolling Co. v. Beckett Co.*, 55 N. J. L. 391 (1893); *Forsaith Machine Co. v. Mengel*, 99 Mich. 280; 58 N. W. 305 (1894); *Butler v. School District*, 149 Pa. St. 351 (1892); *Gibson v. Vail*, 53 Vt. 476 (1881).

³ *Hunt v. Wyman*, 100 Mass. 198 (1868); *Kahn v. Kabunde*, 50 Wis. 235 (1880) (but in this case the buyer was to return the horse within a fixed time, or the seller was to go for it).

⁴ *Lynch v. Willford*, 59 N. W. 311 (1894).

⁵ *Stutz v. Coal Co.*, 131 Pa. St. 267 (1889). If the trial of the property results in its partial consumption, the use of more than is necessary to a fair trial may amount to an adoption of the transaction.

⁶ Sale of Goods Act, § 18, Rule 4.

⁷ *Supra*, p. 50; *Buswell v. Bicknell*, 17 Me. 344 (1840). “The property in the thing passes, and the remedy of the former owner rests

§ 2. Unascertained or Future Goods.

A contract for the sale of such goods cannot operate as a bargain and sale ¹ until and unless the goods described in the contract are unconditionally appropriated to it by one of the parties with the assent of the other.² “In the case of executory contracts,” to quote from a leading English case, “when the goods are not ascertained, or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but when certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place the property might pass, if it was intended to do so, equally as in the case of a contract for specific and ascertained goods. Lord Wensleydale, in the case of *Dixon v. Yates* (5 B. & Ad., at p. 340), put the case of the sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of showing that the property vested in the latter case upon delivery, and in the former by the contract itself.”³

in contract. It is the option conceded to the party receiving which produces this effect.” But the parties may expressly provide that title shall remain in the vendor when the transaction becomes a conditional sale. *Crocker v. Gullifer*, 44 Me. 491 (1858); *Wright v. Barnard Bros.*, 89 Ia. 166; 56 N. W. 424 (1893).

¹ *Supra*, ch. ii.

² Sale of Goods Act, § 18, Rule 5.

³ *Heilbutt v. Hickson*, L. R. 7 C. P. 438, 449, 450 (1872).

1. *The Described Goods.*—When the subject-matter of the contract is not a specific chattel, it is a condition precedent to the passing of title from the seller to the buyer, that the goods appropriated to the contract shall be those which the seller has agreed to deliver and the buyer has agreed to accept.¹ Otherwise it would be possible for one party to transmute the title to goods without the other's assent.² Hence, if the goods appropriated to the contract by either party are not such as have been stipulated for, title will not pass unless the other elects to substitute them for those agreed upon.³

2. *Unconditionally Appropriated.*—Under a contract such as we are now considering, the seller does not bind himself to deliver a particular chattel. He satisfies his obligation by delivering any chattel which answers the stipulated description.⁴ Hence, merely setting apart such a chattel for the buyer will not preclude the seller from changing his mind and selling it to another;⁵ nor will such act alone vest title in, or transfer the risk to, the buyer.⁶

Even when the subject-matter of the contract is so far ascertained that the seller cannot dispose of the chattel and substitute another in its stead without a breach of his obligation to the buyer, title will not pass by force of the

¹ *Aultman v. Clifford*, 55 Minn. 159, 161; 56 N. W. 593 (1893).

² *Gardner v. Lane*, 12 Allen (94 Mass.), 39, 43 (1866).

³ *Gardner v. Lane*, 98 Mass. 517 (1868); *Graff v. Osborne Co.*, 42 Pac. R. 705; 56 Ks. 162 (1895).

⁴ Benjamin on Sales (6th Am. ed.), § 358; *Atkinson v. Bell*, 8 B. & C. 277 (1828); *Johnson v. Hunt*, 11 Wend. (N. Y.) 135, 138 (1834); *Schreyer v. Kimball Lumber Co.*, 54 Fed. 653, 655 (1893).

⁵ *Winslow, Lanier & Co. v. Leonard*, 24 Pa. St. 14 (1854); *Comfort v. Kiersted*, 26 Barb. 472 (1857); *Bryans v. Nix*, 4 M. & W. 775, 792, 793 (1839).

⁶ *Andrews v. Cheney*, 62 N. H. 404 (1882); *Black v. Webb*, 20 Ohio, 304 (1851).

contract, unless the parties agree that it shall pass. Accordingly, if one promises to sell a particular vessel,¹ or vehicle,² when finished in a specified manner, or a particular cargo of grain, when the purchaser accepts a draft for the price,³ title does not pass at once; but the vendor may transfer the property to a third person, who can hold it against the first purchaser. On the other hand, if the seller delivers the stipulated article to the buyer or to some one for transmission to him, pursuant to a term of the contract, and does not reserve the right of disposal, such act amounts to an unconditional appropriation of the article,⁴ passes title to the purchaser, and is irrevocable.⁵ This rule is unquestioned, but its application to particular cases is beset with difficulty,⁶ as will appear more fully when we consider in the next section what amounts to a reservation of the right of disposal.

3. *Mutual Assent*. — Even though one of the parties has unconditionally appropriated to the contract goods conforming to the stipulated description, title will not pass

¹ *Merritt v. Johnson*, 7 Johns. (N. Y.) 473 (1811); *Laidler v. Burlison*, 2 M. & W. 602 (1837).

² *Halterline v. Rice*, 62 Barb. (N. Y.) 593.

³ *Wait v. Baker*, 2 Exch. 1 (1848).

⁴ *Sale of Goods Act*, § 18, Rule 5 (2).

⁵ *Phil. Ry. v. Wireman*, 88 Pa. St. 264 (1879); *Wigton v. Bowley*, 130 Mass. 252 (1882).

⁶ "Whether the selection by one party merely showed an intention in that party to appropriate those goods to the contract, or showed a determination of a right of election, is one of law, and sometimes of some nicety." *Blackburn on Sales* (2d ed.), 129-131, citing *Fragano v. Long*, 4 B. & C. 219, and *Atkinson v. Bell*, 8 B. & C. 277. It will appear in the next section that "a determination of a right of election" may be conditional, e. g., upon the purchaser's accepting or paying a draft on him for the purchase-price. Whether it is conditional or final is a question for the jury, unless the undisputed facts will warrant but one inference. *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295, 296 (1869).

until both parties have assented thereto.¹ However, this assent may precede the act of appropriation, and need not be given in express terms. If a Chicago merchant orders from a New York jobber a quantity of silk of a specified pattern and quality, he impliedly assents in advance to an appropriation of the goods to the contract by the jobber.² This is in accordance with the rule "that when from the nature of an agreement an election is to be made, the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement."³ But in case the order for goods does not give to the seller express or implied authority to despatch them to the buyer, the seller has no right of election, and he cannot appropriate any goods to the contract so as to pass title to the purchaser without the latter's subsequent assent.⁴ The same doctrine is applied by most courts to an order for goods from a manufacturer,⁵ although in some jurisdictions it is held that the manufacturer has implied authority to appropriate the finished article to the contract.⁶

(a) *Mutual Assent to the Passing of Title is subsidiary to Contract to Sell.* — The latter view would not have been entertained had the judges borne in mind the fact that the mutual assent of the parties to the passing of title is distinct from, and subsidiary to, the principal agreement in a contract for the sale of future goods.⁷ This assent

¹ *Reeder v. Machen*, 57 Md. 56 (1881).

² *Smith v. Edwards*, 156 Mass. 221 (1892).

³ *Blackburn on Sales* (2d ed.), 130.

⁴ *Hague v. Porter*, 3 Hill (N. Y.), 141 (1842).

⁵ *Mucklow v. Mangles*, 1 Taunton, 318 (1808); *Moody v. Brown*, 34 Me. 107; 56 Am. Dec. 640 (1852); *Rider v. Kelly*, 32 Vt. 268 (1859).

⁶ *Bement v. Smith*, 15 Wend. (N. Y.) 493 (1836); *Shawan v. Van Nest*, 25 Ohio St. 490 (1874).

⁷ *Brown's Sale of Goods Act*, p. 89.

may be subsequent to the agreement to sell and in the nature of a new meeting of minds.¹ This is brought out very clearly in the following extracts from the cases in the last note: "But here the question turns, not upon the original contract between the plaintiff and Smith & Bryant, but upon the circumstances which afterwards took place, viz.: the payment by the plaintiff, after the greenhouse had been completed, of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff and his assent to such appropriation. . . . It may be that the original contract did not pass the property; but the parties may be said to have entered into a new contract." "If the seller subsequently selects the goods, and the buyer adopts his acts, the contract which before was a mere agreement is converted into an actual sale, and the property passes to the buyer."

Or it may be provided for by a subsidiary term of the original contract. Such a term exists whenever either party is authorized by the contract to despatch the goods to the other,² or to deliver them at a stipulated place,³ unless it is clear that the parties intend that title shall not

¹ Wilkins *v.* Bromhead, 6 Man. & Gr. 963 (1844); Hatch *v.* Oil Co., 100 U. S. 124, 136 (1879); Platt *v.* Peck, 70 Wis. 620 (1888).

² *Supra*, p. 61.

³ Hunt *v.* Thurman, 15 Vt. 336, 343, 344 (1843). "Whatever wood was delivered agreeably to the contract became the property of the defendants; and the plaintiff had no right, afterwards, to take it away. . . the place of delivery" was "part of the contract of sale." White *v.* Harvey, 85 Me. 212, 214 (1892). "The delivery at a place agreed is for the buyer's accommodation. Instead of his taking the goods, they are sent to him at his direction. Then the seller's responsibility is ended, and an acceptance is implied. The buyer, in effect, agrees that such delivery shall operate as a complete transfer of the property. The buyer is not, however, precluded from the right of inspection or examination, unless such right has been previously exercised, and of subsequently objecting that the goods are not according to the contract. To that extent the acceptance may be considered as conditional."

pass until some further act is done, such as measuring and removing wood.¹ In a case of this kind, what is called a place of delivery is really a place of deposit; and the final appropriation of the goods to the contract is made by the purchaser with the precedent assent of the seller.

(b) *Withdrawal of Precedent Assent.* — If the precedent assent of either party is withdrawn before the property is finally appropriated to the contract by the other party, title will not pass upon such unilateral appropriation, although the one withdrawing his assent may subject himself to an action for breach of contract.²

(c) *Waiver of Subsidiary Provision.* — A subsidiary provision concerning the despatch or delivery of goods must be complied with,³ or waived,⁴ in order to have an appropriation under it operate to pass title.⁵

§ 3. Reservation of the Right of Disposal.

In every case of a contract to sell, as distinguished from a bargain and sale, the seller may reserve the right to dispose of the goods until certain conditions are fulfilled.⁶

1. *Specific Deliverable Goods.* — Title to these may be retained by the seller until the purchase price is paid, or some other condition is performed,⁷ if the parties so stipulate.

¹ Home Insurance Co. v. Heck, 65 Ill. 111 (1872).

² Unexcelled Fire Works Co. v. Polites, 130 Pa. St. 536; 18 Atl. 1058 (1889).

³ Wheelhouse v. Parr, 141 Mass. 593; 6 N. E. 787 (1886); Jones v. Schneider, 22 Minn. 279 (1875); Downer v. Thompson, 2 Hill (N. Y.), 137 (1841).

⁴ Sparkes v. Marshall, 2 Bing. N. C. 761 (1836); Hanauer v. Bartels, 2 Col. 514 (1875); Downer v. Thompson, 6 Hill (N. Y.), 208 (1843).

⁵ Ramish v. Kirschbraun, 40 Pac. 1045; 107 Cal. 229 (1895).

⁶ Sale of Goods Act, § 19.

⁷ Marvin Safe Co. v. Norton, 48 N. J. L. 410; 7 At. R. 418 (1886). The rights of the parties and of third persons, under such contracts, will be discussed later.

2. *Specific Goods to be made Deliverable.* — As the title to these does not pass until they have been put into such a state that the seller can “call upon the purchaser to accept them as corresponding to the agreement,” it follows that the seller, without the buyer’s consent, may reserve the right of disposal by annexing some condition to the transfer of the property.¹

3. *Future Goods.* — Where the contract relates to specific goods, the condition imposed by the seller is generally express and unequivocal. In transactions concerning future goods, however, it is often difficult to determine whether a condition has been imposed or not.² When the communications between the parties have been reduced to writing,³ or when the facts of the transaction are undisputed and warrant but one inference as to the intention of the seller,⁴ the question is one for the court. If, however, the facts are in dispute or the intention as disclosed by parol evidence is doubtful, the question is one for the jury.⁵

For cases of this kind, two rules of construction have been established.⁶

Rule 1. Goods deliverable to Shipper’s Order. — The seller is *prima facie* deemed to reserve the right of disposal, when by the bill of lading the goods are deliverable to his or his agent’s order.⁷

¹ *Nicholson v. Tayler*, 31 Pa. St. 128 (1858).

² *Walley v. Montgomery*, 3 East, 585 (1803); *Wilmshurst v. Bowker*, 2 Man. & G. 792 (1841); s. c. on appeal, 7 Man. & G. 882 (1844).

³ *Key v. Cotesworth*, 7 Exch. 595 (1852).

⁴ *Smith v. Edwards*, 29 Hun (N. Y.), 493 (1883); *Wigton v. Bowley*, 130 Mass. 252 (1881).

⁵ *False v. Fletcher*, 34 L. J. C. P. 146; 18 C. B. (N. S.) 403 (1865); *Merchants’ Nat. Bk. v. Bangs*, 102 Mass. 291 (1869); *Al. G. S. Ry. v. Mt. Vernon Co.*, 84 Ala. 173; 4 South. 356 (1887).

⁶ English Sale of Goods Act, § 19, sub. (2) & (3).

⁷ *Ogg v. Shuter*, 1 C. P. D. 47; *Dows v. Nat. Ex. Bk.*, 91 U. S. 618 (1875). “These bills of lading unexplained are almost conclusive proof of an intention to reserve to the shipper the *jus disponendi*,” at p. 631.

This inference of intention may be rebutted by other evidence. Accordingly, if the seller indorses such a bill of lading and sends it to the purchaser;¹ or if he takes the bill of lading in this form for some collateral purpose, such as protecting himself in case the purchaser does not accept the goods;² or if the original contract shows that the vendor is not to retain the right of disposal;³ or if the invoice contradicts the bill of lading, as by declaring that the vendor shipped the goods by the order and for account and risk of the purchaser,⁴ title may pass to the purchaser notwithstanding the form of the bill of lading.

The foregoing rule applies, although the shipper is the consignee's agent to buy and ship the goods, provided he advances his own money or credit for the purchase of the property.⁵ "Where a commercial correspondent, however, set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property, and takes a bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of the pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid."⁶

¹ *Van Casteel v. Bowker*, 2 Ex. 691 (1848).

² *Joyce v. Swan*, 17 C. B. (N. S.) 84 (1864). Cf. *Garbarron v. Kreeft*, L. R. 10 Ex. 274 (1875), which shows that the vendor may retain the right of disposal, if the bill of lading and other evidence clearly disclose his intent to do so in violation of his original agreement.

³ *Coxe v. Harden*, 4 East, 211 (1803), as explained in *Blackburn on Sales* (2d ed.), 146; *Browne v. Hare*, 4 H. & N. 822 (1858).

⁴ *Walley v. Montgomery*, 3 East, 585 (1803). Compare the invoice in this case with that in *Dows v. Nat. Ex. Bk.*, 91 U. S. 618, at p. 622 (1875); and see definition of invoice in *Sturm v. Bowker*, 150 U. S. 328 (1893).

⁵ *Jenkyns v. Brown*, 14 Q. B. 496 (1849).

⁶ *Moors v. Kidder*, 106 N. Y. 32, 40 (1887).

Rule 2. Bill of Lading as Security for Draft for Price. — The right to dispose of the goods is reserved, where the seller draws on the buyer for the price and transmits the draft to the buyer with the bill of lading to secure acceptance or payment of the draft,¹ even though by the bill of lading the goods are deliverable to the buyer or his order.² In cases of this kind, the shipper ordinarily takes the bill of lading to his own order and conditionally endorses it to the buyer; or, if it is taken in the buyer's name, the seller delivers it as security for a draft for the price discounted by a bank.

If the bill of lading³ or railroad receipt⁴ is taken in the name of the purchaser, and forwarded to him, the fact that the seller draws upon him for the price will not warrant the inference that the right of disposal is reserved. If title has passed by an unconditional shipment of the goods it cannot be regained by the seller's sole act.⁵

§ 4. The Risk of the Loss.

This, as a rule, attends the ownership of goods.⁶ Hence, in the case of a bargain and sale, it passes with the title to the buyer, as soon as the contract is made.⁷ If the goods remain with the seller, his liability with respect to them is that of a bailee.⁸ Mr. Justice Chalmers declares that "there appears to be no decision defining the nature of such bailment." In the United States the bailment is considered one of hire, where the seller has bound himself

¹ *Shepherd v. Harrison*, L. R. 5 H. L. 116 (1871).

² *Emery's Sons v. Irving Nat. Bk.*, 25 Ohio St. 360 (1874).

³ *Ex parte Banner*, 2 Ch. D. 273 (1876).

⁴ *Phil. Ry. v. Wireman*, 88 Pa. St. 264 (1878).

⁵ *Wigton v. Bowley*, 130 Mass. 252 (1881).

⁶ *Joyce v. Adams*, 8 N. Y. 291 (1853).

⁷ *Lansing v. Turner*, 2 Johns. 13 (1806).

⁸ *Sale of Goods Act* (2d ed.), 47.

by the contract of sale to keep the goods, but gratuitous where they remain in his possession, through the fault of the vendee in not taking them away.¹ In the case of a contract to sell, the risk is borne by the seller, so long as the general property is in him.² The expense of keeping the property during this period is also to be borne by the seller.³

1. *Risk may be transferred without the Title.* — By agreement of the parties the risk may be separated from the ownership, and may be cast upon the buyer before he acquires title, or may remain with the seller after he ceases to be the owner.⁴

2. *Risk when Delivery improperly delayed.* — The English statute provides that where delivery “has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.”⁵ This rule was suggested by Blackburn, J., in 1872,⁶ in the following words: It “is perfectly good sense and justice, though it is not necessary to the decision of the present case that,” although “the property did not pass,” and “there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed.”

¹ Story on Bailments (4th ed.), § 300 b; *Koon v. Brinkerhoff*, 39 Hun (N. Y.), 130 (1886).

² *McCandlish v. Newman*, 22 Pa. St. 460 (1854); *Brock v. O'Donnell*, 49 N. J. L. 230 (1886).

³ *Chalmers v. McAuley*, 33 At. 767.

⁴ *Castle v. Playfair*, L. R. 7 Exch. 98 (1872); *Stock v. Inglis*, L. R. 12 Q. B. 564; 10 App. Cas. 263 (1885); *Cushman v. Holyoke*, 34 Me. 289 (1852).

⁵ Sale of Goods Act, § 20.

⁶ *Martineau v. Kitching*, L. R. 7 Q. B. 436 (1872).

It has been followed in some of the United States.¹ In the case last cited, the contract was for the purchase and sale of a crop of potatoes to be delivered by the seller on the cars, the seller to give full measure and good merchantable stock; and the buyer to furnish sacks which were to be filled and sewed by his servants. The jury found that the potatoes were "good, merchantable stock" when put into the sacks, and there was evidence that the subsequent decay was due to the purchaser's fault in having them transported in sacks instead of barrels or boxes. The court held that the question whether the risk was on the purchaser during the transit to the cars and before title had passed was properly submitted to the jury. A different view is taken in New York,² where it is said that the default of one party entitles the other to rescind the contract and proceed at once for damages; but that, while the contract remains in force, an accidental loss must be borne by the general owner of the goods; that such loss is "not the necessary consequence of the" default and "has no connection with" it.

¹ *Barker v. Freeland*, 91 Tenn. 112 (1891).

² *McConihe v. N. Y. & E. Ry. Co.*, 20 N. Y. 495, 497, 498 (1859).

CHAPTER IV.

ACCEPTANCE AND RECEIPT.

§ 1. To pass Title at Common Law.

WE have seen that actual receipt of the goods by the buyer is not necessary to the passing of title at common law;¹ that in case of a bargain and sale, title passes by virtue of the contract, without any overt act of acceptance or receipt; that in case of a contract to sell, the title passes upon the unconditional appropriation of the goods to the contract by the seller with the assent of the buyer, and that this assent may precede the appropriation.²

§ 2. To satisfy the Statute of Frauds.

The foregoing rules have been modified by this statute. Under its provisions, a contract, whether it be a bargain and sale or an agreement to sell, is not enforceable, in the absence of part-payment, earnest, or a written memorandum, if the goods exceed a specified sum, unless the buyer accepts and actually receives a part of them.

1. *Acceptance*. — The courts have experienced much difficulty³ in defining this statutory term, and in many

¹ *Van Broecklin v. Smeallie*, 140 N. Y. 72; 35 N. E. 415 (1893).

² *Kelsea v. Ramsey Co.*, 55 N. J. L. 320, 322; 26 Atl. 907 (1893); *Brigham v. Hibbard*, 43 Pac. R. 383; 28 Ore. 386 (1896).

³ *Marvin v. Wallis*, 6 El. & Bl. 726 (1856). "I believe that the party who inserted the words had no idea what he meant by 'acceptance.'" Erle, J., at p. 734.

judicial opinions it is confounded with actual receipt.¹ But the two are quite distinct. There may be an acceptance without a receipt, or a receipt without an acceptance. The statute requires both. It also requires the fact of acceptance as well as the fact of actual receipt to be established by proof of acts of the buyer, over and above the words of his oral sale contract.²

(a) *Statute requires more than Evidence of a Bargain.* — Even in the case of a bargain and sale of specific goods, the statutory acceptance is not made out by evidence that the seller orally offered a particular deliverable chattel for a specified price to the buyer, and that the latter orally accepted the offer.³ Some additional act of the buyer

¹ *Chaplin v. Rogers*, 1 East, 192 (1800). Lord Kenyon's opinion. *Shindler v. Houston*, 1 N. Y. 261 (1848). Wright, J., speaks of "the act of accepting and receiving required to dispense with a note;" apparently treating acceptance and receipt as inseparable. *Denny v. Williams*, 5 Allen (87 Mass.), 1. "Superadded to the language of the contract, there must be some act of the parties amounting to a transfer of the possession, and an acceptance thereof by the buyer." Chapman, J., at p. 3.

² Cases in the last two notes.

³ A different view has been expressed by eminent writers. It is said in Langdell's *Cases on Sales* (p. 1021) "If the contract be for specified goods, the acceptance takes place at the time of the bargain, and the same evidence which proves the bargain will also prove an acceptance." See Browne, *On the Statute of Frauds*, § 321 a, 5th ed. Each writer cites *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261, as the principal authority for this proposition. But Blackburn, J., is careful to state: "There was also sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London." This direction was in writing and was subsequent to the agreement. In the same opinion attention is called to the fact that in *Marvin v. Wallis*, 6 El. & Bl. 726 and *Beaumont v. Brengeri*, 5 C. B. 301, "the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance, subsequent to the agreement, which changed the nature of the possession."

must be shown, from which a jury, if the evidence is conflicting, or a court, if it is not, may find that he assented to the seller's proposal that certain goods should be part of the goods sold.¹ The buyer does such an act when he directs goods, which he has inspected and approved, to be shipped to a designated place,² or by a specified carrier,³ or takes into his possession and keeps a part⁴ or the whole⁵ of such goods, or exercises an act of ownership over them, such as ordering a carriage out for a drive,⁶ or reselling a stack of hay.⁷

(b) *Acceptance to satisfy the Statute need not be Final.* — In England, an act of the buyer may satisfy the statutory requirement of acceptance without amounting to an acceptance in performance of the contract.⁸ “Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract,”⁹ e. g., comparing the bulk with the sample. This view is not generally entertained in the United States. On the other hand it is held that the statutory acceptance is an ultimate acceptance which precludes the buyer from taking any objection to the quantities or quality of the goods

¹ Law Quarterly Review, vol. i. 14.

² Cusack v. Robinson, *supra*.

³ Cross v. O'Donnell, 44 N. Y. 661 (1871).

⁴ Vincent v. Germond, 11 Johns. 283 (1814).

⁵ Pinkham v. Mattox, 53 N. H. 600, 606 (1873). Even though he has the option to reject them, his conduct in retaining them an unreasonable time imports acceptance, and is acceptance in law. Hobbs v. Massasoit Co., 158 Mass. 194, 197 (1893).

⁶ Beaumont v. Brengeri, *supra*.

⁷ Chaplin v. Rogers, 1 East, 192 (1800).

⁸ Sale of Goods Act, § 4 (3).

⁹ Bowen, L. J., in Page v. Morgan, 15 Q. B. D. 228 (1885); Remick v. Sanford, 120 Mass. 309, 316 (1876).

sold and received;¹ “though it does not preclude the purchaser from refusing to accept the residue of the goods, if it clearly appears that they do not conform to the contract.”²

2. *Actual Receipt*. — The courts are agreed that the question whether the buyer has actually received a part of the goods is one of fact; and that the question whether the evidence warrants a finding of actual receipt is one of law.³ Nor have they any difficulty in dealing with a case, where the buyer has taken a part of the goods into his physical possession as his property. Often, however, the goods are not removed by the purchaser, and yet the parties clearly intend that both title and possession shall pass immediately. In order to satisfy the statutory requirement of actual receipt, in such cases, some act of the buyer must be shown, in addition to his oral contract, even where this purports to effect a present sale of a specific chattel.

(a) *What Act amounts to a Receipt*. — Any dealing with the goods by the purchaser as owner with the seller's assent is such an act.⁴ So is a subsequent oral agreement between the parties, that the seller shall thereafter hold the goods as the buyer's bailee;⁵ provided it is clearly established that the seller intends to divest himself of his lien for the purchase price.⁶ In a few jurisdictions it has

¹ *Stone v. Browning*, 51 N. Y. 211 (1872); 68 N. Y. 598 (1877); *Howes v. Jordan*, 39 Md. 472 (1873).

² *Clifford, J.*, in *Garfield v. Paris*, 96 U. S. at p. 563 (1877).

³ *Hinchman v. Lincoln*, 124 U. S. 38 (1887).

⁴ *Marshall v. Green*, 1 C. P. D. 35 (1875) (cutting trees and selling tops and stumps); *Becker v. Holm*, 89 Wis. 86, 92; 61 N. W. 307 (1894) (taking a steamboat out of the river and preparing it for shipment by rail).

⁵ *Marvin v. Wallis*, 6 El. & Bl. 726 (1856); *Webster v. Anderson*, 42 Mich. 554 (1880).

⁶ *Holmes v. Hoskin*, 9 Exch. 753 (1854); *Young v. Blaisdell*, 60 Me. 272 (1872).

been held that "receipt and acceptance must be evidenced by some act of the parties, and that no mere words, however significant, are sufficient." *Kirby v. Johnson*, 22 Mo. 354, 355 (1856); *Malone v. Plato*, 22 Cal. 103 (1863); *Bowers v. Anderson*, 49 Ga. 143 (1873). In the first two of these cases it was clear that the seller's lien was not divested, and the decisions may be sustained on that ground. The third case seems to have been wrongly decided, even under the foregoing rule. After the oral contract was made, the purchaser's agent offered the seller the money, but the latter requested the agent to keep it subject to the seller's check, which was done. It was also agreed that the cotton should remain in the seller's gin-houses, free of storage, until hauled away, but at the purchaser's risk; and the purchaser had the cotton insured.

If the buyer has possession of the goods, when the sale contract is made, any subsequent dealing with them by him as owner satisfies the statute.¹ In case they are in the possession of a third party, as bailee, his subsequent attornment with the seller's assent to the buyer is equivalent to actual receipt by the latter.²

(b) *If Goods are on the Land of a Third Party.* — The proposition that if the goods are on the land of a third person, who is not bailee, or are in some public place to which the buyer and seller have equal right of access, the possession as well as title may be transferred by the

¹ *Edan v. Dndfield*, 1 Q. B. 302; 5 Jurist, 317 (1841) (selling at a lower price than he had a right to take, unless he had become owner). *Snider v. Thrall*, 56 Wis. 674 (1883); *Dorsey v. Pike*, 50 Hun, 534 (1889); s. c. again in 32 N. Y. St. Reporter, 258 (1890). In *Texas Ry. v. Beard*, 68 Tex. 265 (1887), the oral contract of sale was treated as passing title, without any subsequent act by the purchaser; but this holding was not necessary to the decision.

² *Godts v. Rose*, 25 L. J. C. P. 61 (1855); *Townsend v. Hargraves*, 118 Mass. 325, 332 (1875); *Wing v. Peabody*, 57 Vt. 19 (1885).

mere agreement of the parties to that effect,¹ is not sustained by judicial authority in cases arising under the Statute of Frauds. If, subsequent to the agreement of sale, the vendor puts "the goods at the disposal of the vendee," and suffers "the latter to take actual control of them," the statute is satisfied.²

(c) *Common Carrier has Implied Authority to Receive, but not to Accept.* — A common carrier to whom the seller unconditionally delivers goods for transmission to the buyer pursuant to the oral agreement, is the latter's agent to receive them, although he cannot accept them on behalf of the buyer, unless specially authorized thereto.³

(d) *Actual Receipt involves Mutual Assent.* — Mutual assent of the seller and buyer is necessary to actual receipt. Hence a tender to the buyer of goods which he ought to receive, but which he rejects, in violation of the terms of the oral agreement, does not satisfy the statute.⁴ On the other hand, if the seller, in violation of such agreement, refuses to deliver the goods, the buyer cannot make

¹ Langdell on Sales, p. 1023, § 20. In *Tansley v. Turner*, 2 Bing. N. C. 151 (1835), and *Cooper v. Bill*, 3 H. & C. 722 (1864), cited in support of this proposition, there was a memorandum in writing which satisfied the statute, and the vendee took and retained actual control of the goods. Nor do the American cases cited in *Tiffany on Sales*, p. 64, sustain this view. *Leonard v. Davis*, 1 Black, 476 (1861), was brought on a written contract. In *Thompson v. Railway Co.*, 28 Md. 396 (1867), the specific goods were pointed out by the vendor to the vendee, after the contract was made, "for the purpose of making delivery" thereof, and were charged in the vendor's books to the vendee by the latter under the former's directions. In *Cotterill v. Stevens*, 10 Wis. 422 (1860), by the terms of sale, the buyer was to take the logs where he could find them, and did receive a portion of them.

² Benjamin on Sales, § 178, and cases in the preceding note.

³ *Frostburg Mining Co. v. N. E. Glass Co.*, 9 Cush. (Mass.) 115 (1851); *Caulkins v. Hellman*, 47 N. Y. 449 (1872).

⁴ 1 Law Quar. Rev. 15; *Remick v. Sanford*, 120 Mass. 309, 316 (1876).

out a case of actual receipt by forcibly seizing them.¹ A delivery by the seller to a third party to hold until the buyer pays the purchase-price, does not amount to acceptance and receipt by the buyer.²

(e) *Receipt of a Part satisfies the Statute.* — The statute is satisfied by the acceptance and actual receipt of a part of the goods, however trifling this part may be, and even though it may also serve as a sample of quality;³ or though some of the goods are not in existence,⁴ or are of a different species;⁵ provided it is a portion of the bulk stipulated for and enters into the agreed price.⁶ If, however, a portion is received, not in part performance of the oral agreement, but pursuant to a new proposition by the buyer, it cannot satisfy the statute.⁷

(f) *Receipt of Document of Title instead of the Goods.* — The actual receipt of a bill of lading or other document of title to goods may be equivalent to that of the goods themselves;⁸ and in jurisdictions where the term "goods" includes intangible property, the acceptance and receipt of the representative of the thing sold will satisfy the statute, because the delivery of such representative is "the only delivery possible of the thing sold."⁹

¹ *Baker v. Cuyler*, 12 Barb. (N. Y.) 667 (1852); *Brand v. Focht*, 1 Abb. App. (N. Y.) 185 (1867); *Washington Ice Co. v. Webster*, 62 Me. 341, 361 (1873). Cf. dictum of Abbott, C. J., in *Tempest v. Fitzgerald*, 3 B. & Ald. 680 (1820).

² *Hinchman v. Lincoln*, 124 U. S. 38 (1887).

³ *Hinde v. Whitehouse*, 7 East, 558 (1806).

⁴ *Scott v. Ry.*, 12 M. & W. 33 (1843).

⁵ *Elliott v. Thomas*, 3 M. & W. 170 (1838).

⁶ *Garfield v. Paris*, 96 U. S. 557 (1877).

⁷ *Atherton v. Newhall*, 123 Mass. 141 (1877).

⁸ *Currie v. Anderson*, 2 E. & E. 592 (1860); *Andriend v. Randall*, 3 Cliff. (U. S. Cir. Ct.) 99 (1868). Cf. *Quintard v. Bacon*, 99 Mass. 185 (1868).

⁹ *Jones v. Reynolds*, 120 N. Y. 213 (1890); *Meehan v. Sharp*, 151 Mass. 564 (1890).

(g) *Receipt and Acceptance under Contract of Sale with Option to Resell or Repurchase.* — In case the contract is for the sale of goods, with an option to the seller to repurchase¹ or to the buyer to resell,² acceptance and receipt by the original buyer satisfies the statute both as to the original sale and as to the resale. The provision relating to the resale is not an independent contract,³ but one of the terms in the original contract of sale. The property passes between the original vendor and purchaser, subject to a condition subsequent.

¹ *Williams v. Burgess*, 10 Adol. & Ell. 499 (1839).

² *Fay v. Wheeler*, 44 Vt. 292 (1872).

³ *Johnston v. Trask*, 116 N. Y. 136 (1889).

CHAPTER V.

SELLER'S DUTIES. — BUYER'S RIGHTS.

§ 1. Duties and Rights Dependent upon Seller's Engagements: Conditions and Warranties.

THE sale contract has for its primary object the transfer of the general property in certain goods from the seller to the buyer.¹ Hence, the principal duties of the seller are to confer upon the buyer title to the agreed chattels, and to give possession of them to him.²

These, however, may be conditioned, modified, or supplemented by express stipulations of the parties, or by implications from all the circumstances of the case. Moreover, such engagements, whether express or implied, may be essential elements of the sale contract; or, while relating to its subject-matter, they may be collateral to it.

In the English Sale of Goods Act engagements of the former kind are called conditions; those of the latter kind, warranties. The breach of a condition gives rise to a right to treat the contract as repudiated, while the breach of a warranty gives rise to a right to a claim for damages only.³

§ 2. (A) Classification of Conditions.

While the English statute does not classify conditions, nor specifically define the term, its draftsman has called

¹ *Supra*, pp. 1, 2.

² *Martineau v. Kitching*, L. R. 7 Q. B. 436, 449 (1872).

³ Sale of Goods Act, §§ 10-15, 62 (1), "Warranty."

attention to the "important distinction between what may be called promissory conditions, and contingent or casual conditions. In the latter case the obligations of both parties are suspended till the event takes place. In the former case the non-performance of the condition by the promisor (unless excused by law) gives a right to the promisee to treat the contract as repudiated; that is to say, he is discharged from his part of the contract, and, further, he has a claim for damages. In the one case the obligation of the contract does not attach. In the other case the contract is broken."¹

1. *The Nature of Promissory Conditions.* — It is well settled that every engagement of the seller, which is an essential term of a contract to sell, is a promissory condition. Upon the seller's failure to perform an engagement of this character, the buyer can defend an action brought upon the contract;² and also he can recover damages for the seller's breach of such engagement.³

(a) *An Essential Term as a Condition Precedent.* — In *Graves v. Legg*, the plaintiff contracted to sell to the defendant fleece-wool to be shipped from Odessa to English ports with all despatch, and the names of the vessels to be declared as soon as the wools were shipped. With reference to the last stipulation, Baron Parke said: "In the state of things on this record, the simple question is whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much, indeed, as the shipping of the goods at Odessa with all

¹ Chalmers' Sale of Goods Act (2d ed.), 165.

² *Graves v. Legg*, 9 Exch. 709 (1854).

³ *Josling v. Kingsford*, 13 C. B. (N. S.) 447 (1863).

despatch after the end of August." He also declared that if the buyer had accepted the goods, he "could not have insisted on the neglect to name in due time, but if there had been any such neglect, would, nevertheless, have had his remedy for the damage by cross action on the contract to declare the names."

(b) *Damages for its Breach, when its Effect as a Condition is waived.* — The law upon this point in England is well stated by Justice Brett¹ as follows: "In this action, we must decide whether there was not only a breach of contract, but such a breach of contract as entitled the charterer to refuse to load or reload. The question in such cases is said to be whether the warranty was a condition. I apprehend that a stipulation amounting to a condition is necessarily also a warranty, and there may be circumstances preventing its being treated as a condition, and then it is available as a warranty; as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time or a reasonable time, and the cargo is loaded and carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty."²

(c) *A Promissory Condition is not a Collateral Agreement.* — Although an essential term of a contract is spoken of, in the foregoing extract, as "necessarily also a warranty," the English decisions draw a sharp distinction between such an engagement and the collateral agreement of warranty. In a comparatively early case brought by the buyer against the seller for damages, the buyer alleged a special warranty by the seller that goods ordered and furnished as scarlet cuttings were of a

¹ *Stanton v. Richardson*, L. R. 7 C. P. 421, 436 (1872).

² *Cf. Behn v. Burness*, 3 B. & S. 751, 756 (1863).

merchantable quality; and in another count, "an undertaking that they were scarlet cuttings." No special warranty was proved, but Lord Ellenborough ruled that if the goods "were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred;"¹ and the plaintiff recovered damages for the breach of such undertaking, but not on the special warranty.

A modern case brings out the distinction between an essential term, which is a promissory condition, and a collateral agreement, which is a mere warranty, still more clearly. The plaintiff contracted for the purchase of a quantity of oxalic acid from defendant, for the quality of which the defendant declined to become responsible. After a considerable part of the acid had been used by the plaintiff, he had it analyzed, when it was found to contain a considerable admixture of sulphate of magnesia, a defect not discoverable by ordinary inspection. He declined to take more of the article, and sued the defendant upon his contract, charging in one set of counts the non-delivery of oxalic acid in accordance with the contract, and in another set a breach of warranty, averring special damage. Chief Justice Erle charged the jury that there was no evidence of any warranty; but "that the defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that, if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfil that description, they should find for the plaintiff." They returned a verdict for the plaintiff for £400. The ruling was sustained on appeal.²

(d) *Distinction between Promissory Conditions and Warranties.*—The question, what engagements on the

¹ *Bridge v. Wain*, 1 Stark. 504 (1816).

² *Josling v. Kingsford*, 13 C. B. (N. S.) 447 (1863).

part of the seller are essential terms of his contract, or promissory conditions, and what are collateral agreements, or mere warranties, will be more fully discussed in the next section ; and an attempt will be made to state the leading views on this subject which obtain in various jurisdictions.

(e) *Classification of Sale Contract Provisions.* — These may be divided into three classes.

First. Mere conditions, that is, provisions which are available as a defence to the party in whose favor they are made, but the non-fulfilment of which does not subject the other party to any legal liability.

Second. Engagements, which are available to the party in whose favor they exist as conditions precedent, and the non-performance of which subjects the other party to a liability for damages.

Third. Engagements, which from the beginning are collateral to the main object of the sale contract, are never available as conditions precedent to the party in whose favor they are made, and a breach of which subjects the other party to a liability for damages only.

(B) Provisions which are Mere Conditions.

The non-fulfilment of a provision of this character is available only as a defence, and may so operate that the obligation of the contract will not attach to either party. For example, if the contract is for the sale of goods of a certain description to arrive by a designated vessel, neither party is bound, unless the described goods arrive by the specified ship.¹ So, if it is for the future sale of specific

¹ *Shields v. Pettee*, 4 N. Y. 122 (1850). But the seller may lose the advantage of either of these conditions. If he engages that the goods in question are on board, *Hall v. Rawson*, 4 C. B. (N. S.) 85 (1858), or that they are equal to sample, *Dike v. Reitlinger*, 23 Hun, (N. Y. Sup. Ct.), 241 (1880), his contract obligation attaches upon the arrival of the ship.

existing goods,¹ or goods to be obtained from a specific source,² neither party is bound in case, without the seller's fault, the goods perish or cannot be obtained from the stipulated source.

1. *Sale of Goods to be Appraised.* — Contracts for the future sale of goods subject to the approval or to the appraisal of a third person illustrate this class of conditions. If the parties "agree on a method of settling the price irrespectively of anything to be done by themselves, it is the same between them when subsequently settled as if the sum had been an original condition of the bargain; but if the person to whom the naming of it was referred die in the mean time, or refuse to act, the contract is at an end. Such a sale is conditional, but not executory like a contract to sell at a day to come, which is complete in itself, though some act remain to be done in pursuance of it; on the contrary, it is a contract, which, being imperfect in itself as regards one of its terms, is to take effect only when the deficiency is supplied by the performance of a condition precedent, the prevention of which, by the act of Providence or the obstinacy of the agent, defeats the sale entirely."³ Until the agreed person names the price, no obligation attaches to either seller or buyer; and the latter has no interest in the goods, which may have been set apart by the seller for him, nor has he a right of action arising out of the contract.⁴ If either party, however, wrongfully prevents a valuation of the goods by the appraiser, he renders himself liable to an action for

¹ *Dexter v. Norton*, 47 N. Y. 62 (apparently this was a present sale, but the court treated it as a contract to sell).

² *Howell v. Coupland*, L. R. 9 Q. B. 462 (1874), opinion of Blackburn, J., 1 Q. B. D. 258 (1876), opinion of Clesby, B.

³ *Smyth v. Craig*, 3 W. & S. (Pa.) 14, 20 (1841); *Vickers v. Vickers*, L. R. 4 Eq. 529 (1867).

⁴ *Davis v. Davis*, 49 Me. 282 (1862).

damages ;¹ and if the buyer has received and appropriated any of the goods, he becomes liable for the fair value of such portion.²

2. *Sale of Goods to be approved by a Third Person.* — The foregoing doctrine applies to contracts for the sale of goods to be approved by a third person. Hence, an agreement for the purchase of a specified horse for a stipulated price, “provided that within a month he trots 18 miles within one hour, and J. N. to be the judge of the performance,” imposes no obligation on either party if J. N. refuses to act.³ Nor can a recovery be had upon the contract in England, even if the refusal of the third person to act is caused by the wrongful interference of one of the parties.⁴ Resort must be had to an action for damages.⁵

In this country, however, if the third person withholds his approval “from motives of selfish interest, bias, partiality, or corruption, the party prejudiced by such action may, notwithstanding the absence of such approval, recover on the contract for the non-acceptance of the article furnished. In such contracts, it is an implied condition that the person designated to approve shall act with entire good faith to both of the contracting parties. Both parties have the right to insist upon such good faith, and the want

¹ Sale of Goods Act, § 9 (2). *Holliday v. Marshall*, 7 Johns. (N. Y.) 211 (1810). “Although the covenant provided for an appraisement of the improvements, in case the land was not sold to the plaintiff, yet the defendant was not a party to the appraisement. He refused to unite in it, and there is nothing in the covenant making an *ex parte* appraisement binding on the defendant. . . . The plaintiff's claim is, therefore, to be considered as resting in unliquidated damages” (p. 213).

² *Kenniston v. Ham*, 29 N. H. 501, 506 (1854). Sale of Goods Act, § 9 (1).

³ *Brogden v. Marriott*, 2 Bing. N. C. 473 (1836).

⁴ *Vickers v. Vickers*, L. R. 4 Eq. 529 (1867).

⁵ *Batterbury v. Vyse*, 2 H. & C. 42 ; 32 L. J. Ex. 177 (1863) ; *Ludbrook v. Barrett*, 46 L. J. C. P. 798 (1877).

of it will dispense with the condition requiring the approval.”¹ If the goods, or any portion of them, have been received and retained by the purchaser, he must pay the contract-price.²

(a) *Effect of Third Party's Decision.*—When the third party acts in good faith, his decision is final, although it may be erroneous.³ An English writer⁴ declares: “There is a great practical difference between the case of an executory contract for sale, and that of a contract for work to be done, e. g., upon the house or land of another. When there is a contract for work to be done, and the payment for the work is conditioned upon the act of a third party, the contractor may lose the fruit of his labor altogether if the condition fails without the fault of the other. . . . In the case of an executory sale of goods, however, . . . the seller is simply left with the goods on his hands.” The contractor would not lose the fruit of his labor in this country.⁵

3. *Contracts conditioned upon the goods being satisfactory to the buyer*—may be considered in this connection. At times they expressly provide that there shall be no sale unless the article satisfies the purchaser.⁶ Even in the absence of such explicit language, the intention of the parties appears to be, that while the seller shall be bound to furnish the described article, and the purchaser to inspect⁷ or test it,⁸ if these are done and the purchaser is dissatisfied

¹ *Balt. Ry. v. Brydon*, 65 Md. 198, 227 (1885).

² *Badger v. Kerber*, 61 Ill. 328 (1871).

³ *N. E. Trust Co. v. Abbott*, 162 Mass. 148, 154 (1894).

⁴ *Campbell on Sales* (2d ed.), 434.

⁵ *United States v. Robeson*, 9 Pet. (U. S.) 319, 326 (1835); *Sullivan v. Byrne*, 10 S. C. 122 (1877), and similar decisions.

⁶ *Wood Co. v. Smith*, 50 Mich. 565, 569 (1883).

⁷ *School Furniture Co. v. Warsaw Sch. D.*, 130 Pa. St. 76, 93 (1889).

⁸ *Daggett v. Johnson*, 49 Vt. 345 (1877).

with it, no other contract obligation shall attach to either party. It is sometimes said that the seller does not perform his contract, in case he fails to satisfy the purchaser.¹ This statement assumes that the condition is promissory; when in fact it is contingent or casual. It does not give the purchaser the right to refuse the goods and also to claim damages for a breach of contract by the seller. It suspends the obligations² (save those above noted) of both parties, until the purchaser's satisfaction is gained or waived.³ The condition may be waived by retaining the goods.⁴ In a recent English case⁵ Lord Blackburn lays down the general rule that where "it appears that both parties have agreed that something shall be done, which cannot be effectually done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect." Applying this rule to a contract for the sale of a digging machine, on condition that it should be capable of excavating a given quantity of clay in a fixed time on a properly opened up face at C., it was held that the buyer must pay for the machine, although its capability of doing the stipulated work had not been demonstrated, because the seller had been prevented from performing the condition, by the buyer's refusal or neglect to furnish the means of applying the stipulated test.

¹ McClure v. Briggs, 58 Vt. 82, 87; 2 At. 583 (1886).

² Exhaust Co. v. Chicago Co., 66 Wis. 218, 225, 226; 34 N. W. 509. "We think the true rule in such a case is that if the fans are not honestly and in good faith satisfactory to the defendant, and the defendant notified the plaintiff of the fact in a reasonable time, then and in that case there had been no sale." See Hoffman v. Gallaher, 6 Daly (N. Y.), 42-44 (1875).

³ *Supra*, p. 56.

⁴ Campbell Co. v. Thorp, *infra*.

⁵ Mackay v. Dick, 6 App. Cas. 251, 263 (1881).

4. *Judicial Construction of these Contracts.* — Contracts of the kind now under consideration often prove very unprofitable to the seller. In such cases, he is apt to insist that the condition is fulfilled if the goods are such as *ought* to satisfy the purchaser, whether they *do* satisfy him or not; and some courts have upheld him in this contention.¹ They have refused to apply to such agreements the ordinary canons of construction,² but, examining them in the light of the fierce competition developed by modern business methods, have reached the conclusion that even carefully worded expressions in written instruments are to be deemed, not the sober language of a contract, but a drummer's hyperbole.³ Such, however, is not the prevailing view.⁴

§ 3. Promissory Conditions Binding on the Seller.

(A) *To Confer Title on the Buyer.* — That this is one of the fundamental engagements of the seller is apparent from the nature of the sale contract. Persons who enter into an agreement for the sale and purchase of a horse intend to effect a transfer of the general property in that

¹ *Duplex Co. v. Garden*, 101 N. Y. 387; 4 N. E. 749 (1886). "Another rule has prevailed where the object of a contract was to gratify taste, serve personal convenience, or satisfy the individual preference" (p. 390).

² Compare *Campbell Co. v. Thorp*, 36 Fed. 414, 418 (1888), with *Hawkins v. Graham*, *infra*.

³ *Hawkins v. Graham*, 149 Mass. 284, 287; 21 N. E. 312 (1889). In this case, as in *Duplex Co. v. Garden*, *supra*, and in *Iron Co. v. Best*, 14 Mo. App. 503 (1884), the contract was not for the sale of a chattel, which would be left in the seller's possession upon its rejection by the buyer as unsatisfactory, but for an addition to the buyer's realty, so that the materials and services of the plaintiff would be largely or wholly lost, unless paid for by the defendant. Cf. *Campbell on Sales* (2d ed.), p. 434, *supra*, p. 84.

⁴ *Osborne Co. v. Francis*, 38 W. Va. 312 (1893).

horse, not to sell and buy a lawsuit.¹ Hence, “unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass.”²

1. *This Engagement is not Collateral to the Sale Contract.* — Before the enactment of this statute the English cases called such engagement a warranty;³ and that term, rather than condition, is employed by American judges⁴ and writers.⁵ In both countries, however, there is ample authority for the view that this undertaking is an essential element of the sale contract,⁶ a breach of which entitles the purchaser to treat the contract as repudiated. Its true character is accurately presented in an early Kentucky decision.⁷ “This implied warranty is not of the character supposed in the argument, which requires a recovery of the goods by the right owner before an action can be maintained by the purchaser, but is in the nature of an implied undertaking on the part of the seller that the commodity he sells is his own; and that in an action upon such an undertaking, it is a sufficient breach to allege

¹ *Edwards v. Pearson*, 6 Times Law R. 220 (1890). Counsel for the seller argued that “in our law it is held that the purchaser buys the horse as it is. (Lord Esher. — Not a horse which belongs to the seller?) No; it has been held in effect that he only buys the bargain. (Lord Esher. — That is, a lawsuit? I should think that in real truth he intends to buy the horse.) If the purchaser in such a case intends to buy the horse, no more can be said. (Lord Esher. — We think so.)”

² Sale of Goods Act, § 12 (1).

³ *Edwards v. Pearson*, *supra*.

⁴ *Shattuck v. Green*, 104 Mass. 42, 45 (1870).

⁵ 2 Kent's Com. 478; Biddle on Warranties, §§ 224-262.

⁶ *Eiehholz v. Bannister*, 17 C. B. (N. S.) 708 (1864); *Marshall v. Duke*, 51 Ind. 62 (1875), and authorities hereafter cited.

⁷ *Payne v. Rodden*, 4 Bibb, 304 (1816).

that the property belongs to some other." The same view is held in Tennessee,¹ Massachusetts,² West Virginia,³ and perhaps other States.⁴

2. *It is treated as Collateral by some Courts.* — In some jurisdictions, however, this engagement of the seller is treated as a warranty in its narrow sense. It is deemed collateral to the sale contract, not one of its essential terms. One court has held that the seller warrants "a title sufficient to retain the possession in the vendee of the chattels," and that this warranty is not broken "until the vendee's possession of the goods is in some way disturbed, by reason of the title of the true owner."⁵

Other courts liken this engagement of the seller of chattels to the covenant for quiet enjoyment of land, and hold that "when the vendee relies upon it he must either restore to the true owner the property in question, or be prepared to prove its loss under compulsory proceedings,

¹ *Word v. Cavin*, 1 Head, 506 (1858). "The implied stipulation, resulting from the contract, that the property was in the seller . . . is undoubtedly false, and, in view of the law, is broken the instant it is made, if the title were in a third person."

² *Grose v. Hennessey*, 13 Allen, 389 (1866). The buyer was allowed to recover as damages the purchase-price of chattels, although he had not been disturbed in their possession. It was said: "The rules which belong to the covenants of seisin and warranty in conveyances of real property have no application."

³ *Byrnside v. Burdett*, 15 W. Va. 702, 720. Story on Sales is referred to as opposed to this view; but he supports it. "Where there is a total failure of title on the part of the vendor, the vendee may, if the contract is executory and unfulfilled, refuse to perform it, and reclaim any portion of the purchase-money which he may have advanced. So, also, if the contract be executed, he may rescind it, and bring an action of money had and received to recover his advances." § 203 (4th ed.).

⁴ See *Matheny v. Mason*, 73 Mo. 677 (1881); *Flynn v. Allen*, 57 Pa. St. 482 (1868).

⁵ *Gross v. Kierski*, 31 Calif. 111 (1871).

or the payment of money through judgment obtained against him, or voluntarily in answer to a claim made, and in that case must also affirmatively establish that the claimant was the true owner, and that his vendor was without title.”¹

(a) *Reasons assigned for this View.* — Various considerations are suggested in support of this doctrine. It is said, “the owner may never claim and enforce his title, or if he does, the seller may settle with him.”² Again, “if” the buyer’s “possession remains undisturbed, his title will be perfected by lapse of time.”³ Still again, “the breach implies no bad faith, and is, therefore, compatible with fair dealing; and the indemnity is complete by responding therefor after a recovery under the paramount title.”⁴ In some cases, which announce this doctrine, the buyer was in undisturbed and unquestioned possession of the property,⁵ or he did not offer to prove to whom it did belong.⁶ In the last-cited case, Vredenburg, J., said: “It will hardly do, when a person has thus reaped the benefit of a sale, and is holding the proceeds in his pocket, when called upon to pay, to answer: True, I bought; true, I am enjoying the thing I purchased; true, I cannot say who does own it; true, nobody else claims it; but, if the court will permit me, I will entertain them and the jury some days, seeing if I can find somebody in whom I can show some claim.”

3. *Engagement for Quiet Possession.* — Undoubtedly the seller’s engagement for quiet possession, whether ex-

¹ *O’Brien v. Jones*, 91 N. Y. 193, 197 (1883).

² *Case v. Hall*, 24 Wend. (N. Y.) 102 (1840).

³ *Johnson v. Ehming*, 95 Ala. 189; 10 So. 430 (1891), holding that the buyer cannot rescind the contract and return the property to the seller, although the latter had not title.

⁴ *Close v. Crossland*, 47 Minn. 500, 502; 50 N. W. 694 (1891).

⁵ *Linton v. Porter*, 31 Ill. 107.

⁶ *Wansler v. Messler*, 29 N. J. L. 256.

press or implied, is collateral to the main purpose of the sale contract. The buyer's rights, therefore, in case of its breach, do not extend to a repudiation of the sale and a recovery of the purchase-price, but are confined to a claim for damages.¹

4. *Seller's Engagement that the Goods are not encumbered.* — The English statute distinguishes a warranty against encumbrances from the seller's engagement as to title,² because a breach of the former does not go "to the whole value of the contract."³ This distinction has received but little attention from writers⁴ or judges.⁵ In fact, some of the judicial opinions which have maintained most strenuously the doctrine, that the seller's engagement as to title is a warranty as distinguished from a condition, have been pronounced in cases where the sole issue was the seller's liability for a breach of his stipulation against encumbrances.⁶

5. *Damages for Breach of Engagement as to Title.* — It appears to be the general rule in this country that the measure of damages, upon a failure of title, is the purchase-price paid with interest.⁷ In England, however, the buyer

¹ Cases in the last four notes; Sale of Goods Act, § 12 (2). In Scotland, and in a few of our States, a breach of warranty entitles the buyer to rescind the sale. *Infra*.

² Sale of Goods Act, § 12 (3).

³ *Sanders v. Maclean*, 11 Q. B. D. 327, 337, Brett, M. R. (1883).

⁴ *Biddle on Warranties*, § 234; *Benjamin on Sales*, Bennett's Notes, p. 632 (1892).

⁵ *Dresser v. Ainsworth*, 9 Barb. 619 (1850); *Brown v. Cockburn*, 37 Up. Can. Q. B. 592 (1876).

⁶ *Hunt v. Sackett*, 31 Mich. 18 (1875); *Close v. Crossland*, 47 Minn. 500 (1891).

⁷ *Converse v. Miner*, 21 Hun (N. Y.), 367, 375 (1880); *Moorehead v. Davis*, 92 Ind. 303, 306 (1883); *Suth. on Damages*, § 669. The vendor cannot cut down the recovery by showing that the goods were worth much less than he sold them for. *Wilkinson v. Ferree*, 24 Pa. St. 190 (1855).

may recover the purchase-price if paid; or he may sue for unliquidated damages.¹ This view is held in some of our States; and if he sues for damages, he may recover the "difference in value between such title as he took and such title as the" seller engaged to convey.² Even in New York, if the seller's failure of title prevents him from delivering the goods, the buyer may recover as damages the difference between the contract-price and the value at the time of breach.³

6. *Damages for Breach of Engagement as to Quiet Possession and Encumbrances.* — In case the warranty for quiet possession or the warranty against encumbrances is broken, the buyer may recover as damages, not only the value of the property, but all his losses resulting from such breach.⁴

Such is the rule, too, upon a breach of the condition as to title, if the buyer is unable to restore the goods because of their alteration, consumption, destruction, or the like.

7. *When these Engagements will not be Implied.* — The foregoing condition and warranties will not be implied when the circumstances show that the parties intended they should not attach to the contract. Such intention is apparent where the subject-matter of the contract is not the general property in the goods, but whatever title or interest the seller has.⁵ Accordingly, if the seller offers the goods in an official capacity, or as the owner of a limited interest, such as assignee in insolvency,⁶ adminis-

¹ Chalmers' Sale of Goods Act (2d ed.), p. 26.

² *Grose v. Hennessey*, 13 Allen (Mass.), 389 (1866).

³ *Lister v. Windmuller*, 52 N. Y. Supr. Ct. (20 J. & S.) 407 (1885). The time of breach was declared to be either when the seller absolutely refuses to deliver, or announces his inability to deliver.

⁴ *Thurston v. Spratt*, 52 Me. 202 (1863).

⁵ *Gould v. Bourgeois*, 51 N. J. L. 361 (1889).

⁶ *Johnson v. Laybourn*, 56 Minn. 332; 57 N. W. 933 (1894).

trator or executor,¹ commission merchant,² or other agent offering the goods as those of his disclosed principal,³ constable or sheriff,⁴ mortgagee,⁵ pledgee⁶ or trustee,⁷ or if they are offered with notice to the buyer of an adverse claim by a third person,⁸ or at the buyer's risk,⁹ any implied condition or warranty is negatived.

(a) *Sale of Goods not in Vendor's Possession.* — It has been held to be negatived, also, when the goods offered for sale are not in the seller's possession.¹⁰ The judicial deliverances in support of this view, however, are mainly dicta. Ordinarily the language of the contract and the attending circumstances, exclusive of the seller's lack of possession, will disclose the intention of the parties.¹¹

(B) *To Furnish the Agreed Article.* — When the parties contract for the sale and purchase of a specific chattel, which each can examine and judge of for himself, this engagement of the seller is satisfied by the delivery of such chattel. The doctrine of *caveat emptor* applies,¹²

¹ *Mellen v. Boorman*, 21 Miss. 100 (1849).

² *Irwin v. Thompson*, 27 Kans. 643 (1882).

³ *Seemuller v. Fuchs*, 64 Md. 217; 1 At. 120 (1885), holding an auctioneer who sold without disclosing his principal liable on an implied warranty of title.

⁴ *Forsythe v. Ellis*, 4 J. J. Marshall (Ky.), 298 (1830).

⁵ *Harris v. Lynn*, 25 Kans. 281 (1881).

⁶ *Morley v. Attenborough*, 3 Exch. 500 (1849).

⁷ *Cohn v. Ammidown*, 120 N. Y. 398 (1890).

⁸ *Barbee v. Williams*, 4 Heisk. (Tenn.) 522 (1871).

⁹ *Porter v. Bright*, 82 Pa. St. 441 (1876).

¹⁰ *Huntington v. Hall*, 36 Me. 501 (1853); *Scranton v. Clark*, 39 N. Y. 220 (1868).

¹¹ *Eichholz v. Bannister*, 17 C. B. (N. S.) 708 (1864), opinion of Byles, J.

¹² *Salisbury v. Stainer*, 19 Wend. (N. Y.) 159 (1838); *Barnard v. Kellogg*, 10 Wall. (U. S.) 383 (1870).

and the buyer must take the agreed article for better or for worse.¹

If, however, the character of the article cannot be discovered upon a reasonable examination by the buyer, and the parties are treating, not for a specific chattel, whatever its character may turn out to be, but for a chattel possessing certain characteristics, then its possession of those characteristics is of the essence of the contract. The seller is bound to furnish, and the buyer has a right to demand, not simply a particular mass of materials, but that mass possessed of the stipulated characteristics. Accordingly, if the subject-matter of the contract is a crop of Skirving's Swede turnip-seed then growing on certain land; or a particular parcel of blue vitriol or of Paris green; or specified stacks of hemp, — the seller does not satisfy his obligations by delivering that crop of seed, if it is in fact not Skirving's Swede turnip-seed;² or that particular parcel of vitriol, if it is saltsburger and not blue vitriol;³ or the particular green substance, if it is chrome and not Paris green;⁴ or the specified stacks, if they are composed mainly of weeds and not of hemp.⁵

1. *This Rule is applied most frequently to Contracts to sell.* — This rule, that when goods are sold by description there is an implied condition that they shall correspond with the description, is much more frequently applied to agreements to sell than to contracts of present

¹ Kirkpatrick v. Gowan, 9 Ir. R. C. L. 521 (1875). [“A stack of Cumberland and small Welsh coal mixed, lying in a shed in my yard,” and no allegation that this description was an essential term of the contract.] And he has a right to refuse any other article. Webster Co. v. Dryden, 90 Ia. 37; 57 N. W. 637 (1894).

² Allan v. Lake, 18 Q. B. 560 (1852).

³ Hawkins v. Pemberton, 51 N. Y. 198 (1872).

⁴ Jones v. George, 61 Tex. 345 (1884).

⁵ Foggs' Adm'r v. Rodgers, 84 Ky. 559; 2 S. W. 248 (1886).

sale.¹ If the buyer orders "Calcutta linseed,"² or "xx pipe-iron,"³ or "strictly No. 1 long berry sound red wheat,"⁴ or "steel serap consisting of clippings and punchings from the steel plates and angles and beams used in the construction of the U. S. cruisers built by the seller,"⁵ the seller is bound to appropriate to the contract goods which answer to that description. "When the subject-matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."⁶

(a) *Sale with all Faults.*—The description of the goods does not cease to be of the essence of the contract, although the sale is with all faults. This additional provision means "such faults or defects as the article sold might have, retaining still its character and identity as the article described."⁷

¹ "The rule is almost necessarily confined to executory contracts, for where goods are identified and agreed upon at the time the contract is made, they cannot, in the ordinary case, be said to be sold by description." Brown's Sale of Goods Act, p. 63.

² *Wierler v. Schlizzi*, 17 C. B. 619 (1856).

³ *Dounce v. Dow*, 64 N. Y. 411 (1876).

⁴ *Fogel v. Brubaker*, 122 Pa. St. 17; 15 At. 692 (1888); *cf.* *Shisler v. Baxter*, 109 Pa. St. 443 (1885). On sale of "Wakfield cabbage-seed" by dealer, no undertaking that the seed corresponds with the description.

⁵ *Columbian Iron Works v. Douglas*, 34 At. 1118; Md. (1896).

⁶ *Pope v. Allis*, 115 U. S. 363, 371, 372; 6 Sup. Ct. 69 (1885).

⁷ *Whitney v. Boardman*, 118 Mass. 242, 247 (1875); *cf.* *Taylor v. Bullen*, 5 Exch. 778 (1850). Ship described as "teak-built," but to

2. *Sale by Description and by Sample.* — The contract may be for the sale of goods by description, and also by sample: when there are two implied conditions, one that the goods shall conform to the description, and the other that they shall conform to the sample.¹ In fact, a sale by sample is but a species of sale by description. The sample is employed instead of words as a means of communication between the parties. Its function is to inform the buyer of the essential characteristics of the article he is contracting for; ² to represent it.³

(a) *When a Sale is by Sample.* — A specimen of an article may, indeed, be used during the negotiation for a different purpose. It may be presented by the seller and examined by the buyer, to enable the latter “to form a reasonable judgment of the commodity.”⁴ In this case the seller does not engage for the conformity of the bulk to the sample. His only undertaking is that the sample is an honest and not a fraudulent one; ⁵ that it has been taken from the bulk in the usual way.⁵ The sale is made upon inspection, not by description. *Caveat emptor* applies.

To which of these classes a particular transaction be-
be taken with all faults and without allowance for any defect or error whatever. It was not teak-built, but this misdescription, it was held, was nullified by the subsequent stipulation as to “any error whatever.”

¹ *Bach v. Levy*, 101 N. Y. 511; 5 N. E. 345 (1886); *Gould v. Stein*, 149 Mass. 570; 22 N. E. 47 (1889). In *Parker v. Palmer*, 4 B. & C. 387, 391 (1821), it is said: “The words ‘per sample’ are not a description of the commodity sold, but a mere collateral engagement on the part of the seller that it shall be of a particular quality.” This view is not tenable.

² *Drummond v. Van Ingen*, 12 App. Cas. 284, 297 (1887).

³ *Bradford v. Manly*, 13 Mass. 138 (1816); *Russell v. Nicolopuco*, 8 C. B. (N. S.) 362 (1860).

⁴ *Gardner v. Gray*, 4 Camp. 144 (1815); *White v. Dougherty*, 18 Ret. (Sc. Sess. Cas. 4th ser.), 972 (1891).

⁵ *Waring v. Mason*, 18 Wend. (N. Y.) 425, 434 (1837).

longs is a question of fact,¹ and often a difficult one.² If the contract has been committed to writing, and no reference is made to a sample, it is clear that conformity of the bulk to the sample is not an agreed term.³ So if the buyer is required to inspect the goods for himself.⁴

3. *Fitness for a Particular Purpose.* — (a) *Express Engagement.* — If the parties expressly stipulate that the described article shall be suitable for a particular purpose, it is clear that the seller does not furnish the thing agreed upon unless it possesses the fitness stipulated for. Such fitness is an essential characteristic of the article. A stipulation of this kind exists when a buyer asks for “copper for sheathing a vessel,” and is assured by the seller that “he will supply him well.”⁵

(b) *Implied Engagement.* — It is not necessary, however, that the undertaking be in express words. Whenever the facts of a case fairly warrant the inference that the parties understood the subject-matter of the sale contract to be not a designated article merely, but that article possessed of fitness for a known use, the seller engages to

¹ *Beirne v. Dord*, 5 N. Y. 95, 99 (1851). Sale of Goods Act, § 15.

² *Ames v. Jones*, 77 N. Y. 614 (1879); *Atwater v. Clancy*, 104 Mass. 369 (1871).

³ *Meyer v. Everth*, 4 Camp. 22 (1814). A bill of parcels, or memorandum of certain facts connected with the transaction, is not a written contract. *Bradford v. Manly*, 13 Mass. 139 (1816).

⁴ *Barnard v. Kellogg*, 10 Wall. (U. S.) 383 (1870); *White v. Dougherty*, *supra*. It is apparent from the opinion in this case that, in Scotland, a failure to preserve and identify the sample is strong evidence that the parties did not intend to contract for conformity of bulk to sample; cf. *Brown's Sale of Goods Act*, p. 77.

⁵ *Jones v. Bright*, 5 Bing. 533 (1829). “Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . Here there has been, in my opinion, an express warranty” (in the sense of condition precedent). *Best, J.*, 544, 545. See opinion of *Burrough, J.*, 548, 549.

supply the article with this attribute.¹ In the language of Justice Brett, “You must therefore first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. . . . If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description ; that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which it contained in words in the contract, or which would be so contained if the contract were accurately drawn out.” Such an engagement is fairly inferable whenever the buyer apprises the seller of the particular purpose for which the article is required, and has a right to rely and does rely on the seller’s skill or judgment in supplying the agreed thing.²

(c) *Seller must be notified of Particular Purpose.* — The notification by the buyer may be made directly to the seller or through a third person ;³ it may be communicated by express words or by conduct,⁴ but it must in some way be brought home to the seller. If the buyer is known to the seller as a woollen merchant, but not as a tailor, his order for a quantity of “indigo blue cloth” does not amount to a notification that he requires the goods for the

¹ *Randall v. Newson*, 2 Q. B. D. 102, 109 (1877).

² Sale of Goods Act, § 14.

³ *Englehardt v. Clanton*, 83 Ala. 336, 341; 3 So. 680 (1887).

⁴ *Gillespie v. Cheney*, 65 L. J. Q. B. 552 (1896), 2 Q. B. 59. Whether “the particular purpose for which the goods were required” was made known to the seller may “be gathered from the course pursued and the conduct and acts and correspondence of the parties antecedent to the contract.” Lord Russell, 554, 555.

purpose of making them into servants' liveries.¹ Nor will the seller's supposition that the buyer proposes to use the goods for a particular purpose avail the latter, when their fitness for such use does not enter into the negotiations.²

(d) *Reliance on Seller's Skill or Judgment.* — The buyer has a right to rely on the skill and judgment of the seller, not only when this is clearly stipulated for,³ but whenever their relations are such that in the ordinary course of things inspection by the purchaser is impracticable,⁴ or the seller has, or assumes to have, superior skill and judgment⁵ in determining its suitability for the required purpose. If one agrees to sell to another, who is buying hogs for the market, a number of hogs for immediate shipment, the buyer, not having an opportunity to inspect them before delivery, must necessarily rely upon the seller's judgment in the selection of particular hogs and their appropriation to the contract.⁶

(e) *The Superior Skill and Judgment of a Manufacturer or Producer.* — The seller of an article, who is also its manufacturer, producer, or grower, is in a much better position to judge of its fitness for a designated purpose than the ordinary buyer. He is, or holds himself out to be, conversant with its qualities and its adaptability, as well as with the processes of its manufacture,⁷ or the conditions of its production. When such a seller accepts an order

¹ *Jones v. Padgett*, 24 Q. B. D. 650 (1890).

² *Hight v. Bacon*, 126 Mass. 10 (1878).

³ *Brown v. Eddington*, 2 Man. & Gr. 279 (1841).

⁴ *Morse v. Stockyard*, 21 Ore. 289; 28 Pac. 2 (1891).

⁵ *Beals v. Olmstead*, 24 Vt. 114 (1852).

⁶ *Best v. Flint*, 58 Vt. 543; 5 At. 192 (1886).

⁷ *Drummond v. Van Ingen*, 12 App. Cas. 284 (1887). "It would be unreasonable to expect from the merchant an exact knowledge, not only of the sort of article which he wants, but also of the processes by which it is to be manufactured. He has a right to presume that the manufacturer understands his own business, and will use such methods

for his product to be put to a particular use, "it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller."¹ In such cases, he impliedly engages that the article is fit for the designated purpose; and such engagement extends to latent defects which might have been guarded against by his exercise of reasonable skill during the process of its manufacture, growth, or production.² The manufacturer who undertakes to supply a cloth merchant with "coatings," is bound to furnish material which is fit to be made into coats in the usual manner. If he supplies cloth which is unsuitable for such use, because of a latent defect resulting from the mode of manufacture, he does not perform his contract.³

Nor does the manufacturer of a windmill, which is ordered for use at a particular place, perform his contract by supplying a mill which will not work well at that place. "It would be most unreasonable to hold that the buyer was bound to pay for a mill that would not work at all in the place agreed upon. . . . The manufacturer was bound to know whether the mill would work well at the place chosen, and, as it did not, he has no right to compel payment of the agreed price. The price agreed upon was for a windmill that would work well on the place selected, and not one that would work well in an open plain or upon a hill-top."⁴

as may be proper to produce a good article of the kind ordered. The burden of ascertaining beforehand that this can be done, or how it is to be done, does not rest upon him" (at p. 288).

¹ *Hoe v. Sanborne*, 21 N. Y. 552, 563 (1860).

² *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 116 (1883). Indeed, if the undertaking of the manufacturer is to supply an article fit for the particular purpose, it is immaterial whether he exercises reasonable skill or not. His engagement is absolute. *Rodgers v. Niles*, 11 Ohio St. 48, 56 (1860); *Randall v. Newson*, 2 Q. B. D. 102 (1877).

³ See note 7, p. 98.

⁴ *McClarmock v. Flint*, 101 Ind. 278, 282 (1884).

(f) *The Rule applies to Quarrymen and Seedgrowers.* — The same doctrine applies to a quarryman who sells granite blocks to a contractor for use in the construction of a particular sewer. He impliedly engages that the blocks shall be such as the sewer contract requires.¹ It is applicable, also, to the grower of seeds, who “must be presumed to be cognizant of any omissions or negligence whereby they have been deteriorated or rendered unfit for use.” In contracting to sell to a market-gardener a quantity of “large Bristol cabbage-seed,” he impliedly engages that the seed supplied under the contract is “free from any latent defect arising from the mode of cultivation.”² Although the seed furnished was raised upon Bristol cabbage stocks, yet if “these stocks were planted in the vicinity of stocks of other varieties of cabbage and were fertilized by the pollen therefrom, and in consequence of the crossing of the varieties” the seed became impure and lost the character and quality of large Bristol cabbage-seed, it was not the article contracted for.

(g) *Buyer relies on his Judgment in Case of a Specified Article bought under its Trade Name.* — The cases which we have been considering are clearly distinguishable from those where the parties contract for “a specified article under its patent or other trade name.”³ Here the buyer does not rely on the seller’s superior skill and judgment. He takes the risk of its answering the purpose for which he procures it. Accordingly, if the buyer gives an order to the manufacturer for “your patent hopper and apparatus to fit up my brewing-copper with your smoke-consuming furnace;”⁴ or for “your Challenge auger outfit

¹ *Breen v. Moran*, 51 Minn. 525, 530; 53 N. W. 755 (1892).

² *White v. Miller*, 71 N. Y. 118 (1877).

³ Sale of Goods Act, § 14 (1).

⁴ *Chanter v. Hopkins*, 4 M. & W. 399 (1838). “It appears to me that this is the ordinary case of a man who has had the misfortune to order a particular chattel on the supposition that it will answer a particular purpose, but finds it will not” (p. 405).

for boring wells ;”¹ or if the manufacturer declares, “ I undertake to make you a two-color printing-machine on my patent principle ;”² or, “ I contract to sell eight hundred tons of my No. 1 and No. 2 foundry pig-iron ;”³ or, “ I agree and contract to supply a No. 2 size refrigerating machine as constructed by me, and to put it in operation in your brewery,”⁴ — there is no implied engagement on the part of the seller that the specified article shall serve the special purpose for which the buyer obtains it. “ Such a contract assumes that the parties know what is the character of the article ” about which they are treating.

Whether a particular transaction is a sale by description, or a sale of a specified article under its trade name, is often a question of difficulty. In a recent decision upon this topic, Lord Chief Justice Russell said, that the trade-name provision of the English statute “ is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles, — steam-ploughs, or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise.”⁵

(h) *No Reliance by Buyer when he specifies the Materials or Methods.* — Nor does the buyer rely on the

¹ *Goulds v. Brophy*, 42 Minn. 109 ; 43 N. W. 834 (1889). “ Here the defendant simply ordered a specific article of a known, recognized, and defined make or description, which was manufactured by the plaintiffs, and in the market. There was an implied warranty — or more correctly speaking, condition of the contract — that it should conform to the description and be of good material and workmanship according to that description, but none that it would answer the purpose described or supposed. The rule of *caveat emptor* applies ” (p. 112).

² *Ollivant v. Bayley*, 5 Q. B. 288 (1843).

³ *Beck v. Sheldon*, 48 N. Y. 365, 370 (1872).

⁴ *Seitz v. Brewers' Co.*, 141 U. S. 510 (1891) ; 12 Sup. Ct. 46.

⁵ *Gillespie v. Cheney* (1896), 2 Q. B. 59, 64 (coal for bunkering steamers).

superior skill or judgment of the manufacturer in respect of materials or methods for which he clearly stipulates.¹ "It cannot be admitted that an artificer of any sort is to be considered as undertaking that any machine, instrument, or vessel, which he makes for the use and by the direction of another, and according to specifications furnished by his employer, shall answer the purpose for which it was designed by the projector. It is the projector, the man who designs the instrument and controls its material, shape, and mode of construction, who is responsible for its adaptation in material, shape, and mode of construction to the end for which it is intended."²

(i) *The Engagement of Breeders of Animals.* — We have seen that the grower of seeds, upon selling them, engages that they are free from any latent defect arising from the mode of cultivation. Does the breeder of an animal, in selling it for breeding purposes, impliedly engage that it is suitable for that use? The decisions upon this subject have been made in cases where the contracts related to specified chattels under their trade names, or the circumstances have shown that the buyer made his own selection. Still the judges have declared that no reason exists in these cases for holding the seller to such an implied undertaking. It is said that whether the animal possesses the power of begetting or bearing offspring does not depend upon the breeder's methods, nor is it a subject upon which the breeder has, or can fairly be presumed to have, more knowledge than the buyer, "until the course of

¹ *Cunningham v. Hall*, 4 Allen (Mass.), 268, 275 (1862). *J. I. Case Plow Works v. Niles*, 90 Wis. 590, 603 (1895); 60 N. W. 1013. "The contract was not for the manufacture of wheels generally to satisfy a required purpose, but for the manufacture and delivery of a specific kind or plan of wheels of specified dimensions." The purchaser relied upon his own judgment.

² *Ricketts v. Sisson*, 9 Dana (Ky.), 358, 359 (1840).

nature has developed the truth.”¹ In a case where the plaintiffs bought a bull which proved impotent, the court said: “Because the defendants raised the bull they sold to plaintiffs, they are not chargeable with any knowledge, or opinion even, in respect to a matter beyond the reasonable scope of human knowledge, namely, whether the bull would prove impotent and to be wholly destitute of the power of procreating his kind; and hence the ground of presumed or reasonably imputed knowledge as a foundation in this case of an implied warranty” (condition) “wholly fails.” The rule of the civil law is different.²

It is submitted, however, that the doctrine stated in the following paragraph should be applied to the sale of animals.

(j) *Is a Dealer's Undertaking the same as a Manufacturer's?* — In England and in many of our jurisdictions the seller, who is accustomed to deal in the articles which are ordered for a particular purpose, incurs the liability which we have seen attaches to the selling manufacturer.³ Some of our courts hold, however, that he does not impliedly engage for the suitability of the article. It is said, “In the case of a purchase of this description” (powder sold to be used for blasting), “the purchaser knows that the dealer relies upon the character and repu-

¹ *Simcoe Society v. Wade*, 12 Up. Can. Q. B. 614, 616 (1855); *McQuaid v. Ross*, 85 Wis. 492, 495 (1893); 55 N. W. 705.

² See *Moyle's Contract of Sale*, p. 195; *Pothier's Contract of Sale* (Cushing's ed. 1839, 126-134).

³ *Sale of Goods Act*, §§ 14, 15. *Gammell v. Gunby Co.*, 52 Ga. 504 (1874); *Dushane v. Benedict*, 120 U. S. 630, 636; *Zimmerman v. Druecker*, 44 N. E. 557. Ind. App. (1896). This is also the rule of the civil law. “It is the same in regard to the dealer whether he is or is not the maker of the articles which he sells. By the public profession which he makes of his trade he renders himself responsible for the goodness of the merchandise which he sells for the use to which it is destined.” *Pothier's Contract of Sale*, 132; *Bulkley v. Honold*, 19 How. U. S. 390 (1856), applying the law of Louisiana.

tation of the manufacturer, and the purchaser has the same opportunity of determining as to any latent defects in the merchandise as the seller, and consequently, under such circumstances, the rule of *caveat emptor* applies.”¹ This doctrine appears to have originated² in *Parkinson v. Lee*,³ a case which, after having been practically overruled, has been nullified by the Sale of Goods Act.⁴

The better view is that where “the purchaser does not designate any specific article, but orders goods of a particular quality or for a particular purpose, and that purpose is known to the seller, the presumption is the purchaser relies upon the judgment of the seller, and the latter, by undertaking to furnish the goods, impliedly undertakes they shall be reasonably fit for the purpose for which they are intended; and he will be answerable for any defect in the material, or in the construction, by which the value is diminished.”⁵

(*k*) *The Manufacturer as a Dealer*. — Some courts have narrowed the manufacturer’s implied engagement by treating him as a dealer, with respect to materials, which he buys from others and uses in producing the agreed article. Where this view obtains, a manufacturer who, for example, sells circular saws, to be used by the purchaser in a circular-saw mill, is liable “for any latent defect not disclosed to the purchaser, arising from the manner in which the article was manufactured; and if he knowingly

¹ *Kain v. Larkin*, 38 N. Y. Snopl. 546 (1896); *Healy v. Brandon*, 66 Hun, 515; *Affid.* 142 N. Y. 681 (1894); *Forrow v. Andrews & Co.*, 69 Ala. 96 (1881).

² *Sands v. Taylor*, 5 Johns. 395, 407-409 (1810); *Dickinson v. Gay*, 7 Allen, 29, 32 (1863).

³ 2 East, 314; see *Randall v. Newson*, 2 Q. B. D. at p. 106.

⁴ *Chalmers' Sale of Goods Act* (2d ed.), 33, 34.

⁵ *Gerst v. Jones & Co.*, 32 Gratt. 518, 521, 522 (1879), distinguishing *Mason v. Chappell*, 15 Gratt. 572, as a case of sale of a specified article under its trade name.

uses improper materials, he is liable also ; but not for any latent defect in the material which he is not shown and cannot be presumed to have known.”¹

4. *Seller engages that Goods are Merchantable.* — Whether the seller is manufacturer or dealer, he impliedly engages that goods sold by description are merchantable. “The purchaser has a right to expect a salable article answering the description in the contract. . . . He cannot without a warranty insist that it shall be of any particular quality or fineness ; but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.”²

(a) *Extension of this Rule in England.* — This rule is applied in England to present sales as well as to contracts to sell ; and to cases where the buyer had an opportunity to examine the goods, provided he did not examine them, or the unmerchantableness was of such a character as not to be revealed upon a proper examination.³ But it is not applied to a sale of specified articles, as distinguished from a sale of articles of a particular kind.

(b) *Rule restricted in the United States.* — In this country many courts restrict the rule to contracts to sell by description,⁴ or to present sales without an opportunity of inspection.⁵ The seller satisfies his obligation if the article supplied is merchantable generally, although not

¹ *Hoe v. Sanborn*, 21 N. Y. 552, 566 ; *Bragg v. Morrill*, 49 Vt. 45 (1876).

² *Gardiner v. Gray*, 4 Camp. 144, 145 (1815).

³ *Chalmers' Sale of Goods Act* (2d ed.), § 14, and commentary thereon.

⁴ *Howard v. Hoey*, 23 Wend. 350 (1840). “When the contract is executory,” it “always carries an obligation that it shall be at least merchantable, — at least of medium quality or goodness” (p. 351). *Winsor v. Lombard*, 18 Pick. 57 (1836).

⁵ *Moore v. McKinley*, 5 Calif. 471 (1855).

salable for every purpose for which, if perfect, it might be used,¹ also if it is salable in the market under its contract name, although somewhat adulterated.²

(c) *Present, not Future, Merchantableness.* — The seller's implied engagement for merchantableness does not extend, as a rule, beyond the time of the appropriation of the goods to the contract. Whether he has supplied the articles agreed upon, depends upon their character and condition when supplied. He does not undertake that they shall continue merchantable.³ Even if he agrees to deliver them at a distance, he is not liable for such deterioration as is necessarily incident to their transportation.⁴ But when they are furnished for shipment, whether he pays for their carriage or not, he impliedly engages that they are fit for such shipment.⁵ If the buyer insists upon having the article prepared and delivered at a particular time, he absolves the seller from liability for any unmerchantableness due to the latter's compliance with the order.⁶

¹ *Hart v. Wright*, 17 Wend. 267 (1837) (flour fit for many purposes but unsuitable for starch). *Jones v. Padgett*, 24 Q. B. D. 650 (1890).

² *Gosler v. Eagle Sugar Refinery*, 103 Mass. 331 (1869) (manila sugar which contained four per cent of sand).

³ *Lord v. Edwards*, 148 Mass. 476; 20 N. E. 161 (1889); *English v. Spokane Com. Co.*, 57 Fed. 451 (1893) (seller, in Omaha, contracted to ship a car-load of strictly fresh eggs to buyer in Spokane Falls).

⁴ *Bull v. Robinson*, 10 Exch. 342 (1854).

⁵ *Mann v. Evertson*, 32 Ind. 355 (1869); *Carleton v. Lombard*, 149 N. Y. 137 (1896). "The plaintiffs were not only entitled to the thing described, but to that thing in such condition and so free from hidden defects as to make it available to them as an article of commerce and fit for transportation" (p. 150) (petroleum, improperly refined, which corroded the cans in which it was placed by sellers for transportation by buyer to India).

⁶ *Mattoon v. Rice*, 102 Mass. 236 (1869) (a marketman ordered a butcher to kill a good hog that night and deliver it the next morning, although the butcher had notified him that the weather was unsuitable).

5. *Engagement of the Vendor of Provisions.* — In most jurisdictions, the foregoing rules govern the sales of provisions.¹ If the purchaser selects the article, *caveat emptor* applies.² If he orders an article to be used as food, the seller who undertakes to fill the order impliedly engages that it is fit for that use.³

(a) *Does he engage that they are Wholesome?* — There are some decisions, and many dicta, however, in this country to the effect that, upon a sale of provisions for immediate domestic use, the seller impliedly engages that they are wholesome. These judicial utterances are based⁴ upon a statement by Blackstone that, "In contracts for provisions, it is always implied that they are wholesome; and if they be not, the same remedy" (action for "damages for this deceit") "may be had."⁵ But, as Mr. Benjamin has pointed out, no authorities are cited for this proposition, and "the notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which" made "the sale of unsound food punishable."⁶ Courts which still maintain this doctrine

¹ Benjamin on Sales (Bennett's ed. 1892), §§ 670-72, and pp. 647, 648.

² *Burnby v. Bollett*, 16 M. & W. 644 (1847); *Giroux v. Stedman*, 145 Mass. 439; 14 N. E. 538 (1888).

³ *Smith v. Baker*, 40 L. T. (N. S.) 261 (1878). "In this case, if the butcher had not gone and selected his meat, but had ordered it, there would have been, no doubt, an implied warranty on the part of the dealer "that it was of merchantable quality" (p. 263).

⁴ *Van Bracklin v. Fonda*, 12 Johns. (N. Y.) 468 (1815). The seller knew that the beef was unsound and unwholesome, and did not communicate the fact to the buyer. *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219, 227 (1852) (action against druggists for damages caused by negligently mingling cantharides with snake-root and Peruvian bark, when filling a prescription for plaintiff).

⁵ 3 Blackstone's Commentaries, p. 165.

⁶ Benjamin on Sales, *supra*. *Goad v. Johnson*, 6 Heisk. (Tenn.) 340 (1871).

urge in its support that it is conducive "to health and personal safety."¹ In the case last cited it is said: "And where articles of food are bought for consumption, and the vendor sells them for that express purpose, the consequences of unsoundness are so dangerous to health and life, and the failure of consideration is so complete, that we think the rule, which has often been recognized, that such sales are warranted, is not only reasonable, but essential to public safety. . . . It is safer to hold the vendor to a strict accountability than to throw the risk on the purchaser." This consideration does not apply to sales of food for animals.²

6. *Quantity as an Essential Term or Condition Precedent.*—Quantity, as well as quality, may be an essential term of the sale contract. When it is, the seller is bound to furnish, not only the kind, but the amount of goods agreed upon. If the contract is "for 250 barrels of cement," the seller has a right to that amount, and can reject the tender of a different quantity;³ unless a larger number is tendered to insure a full compliance with the contract, and without any charge for the excess.⁴ The seller, who supplies and demands payment for a larger or

¹ *Hoover v. Peters*, 18 Mich. 51 (1869).

² *Lukens v. Freind*, 27 Kans. 664, 670 (1882).

³ *Downer v. Thompson*, 2 Hill (N. Y.) 137 (1841); *Barter v. Kane*, 17 Wis. 371 (1863). So if the contract is for "half a chest of French plums, 2 hogsheads of raw sugar, and 100 lumps of white sugar," *Champion v. Short*, 2 Camp. 53 (1807), or for "a pair of horses," *Hamilton v. Hart*, 8 Sess. Cas. 1st Series, 596 (1830).

⁴ *Downer v. Thompson*, 6 Hill (N. Y.), 208 (1843). "The excess would hardly seem to be so large as to preclude a jury from inferring that it was only added to make sure of having delivered enough, there being some doubt perhaps as to the manner in which the defendant might wish the quantity determined, the article moreover being liable to some loss by leakage, and the excess being of no very great value as compared with the anticipated profit upon the whole."

smaller quantity than that agreed upon, attempts "to change the subject of the contract."¹

(a) *Effect of Such Words as "About."* — When a specified quantity of goods is the subject of the contract, the addition of such qualifying words as "about," "more or less," and the like "is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight."² Hence, a contract for "about 300 quarters, more or less, of foreign rye," does not warrant the seller in supplying 345 quarters;³ nor is one for "23,000 feet of lumber, more or less," performed by furnishing 16,000 feet.⁴ In these cases, the deficiency or excess was so great that people would not ordinarily consider it as included in the qualifying words,⁵ and the court properly held that the seller had not complied with his contract. As a rule, however, it is a question for the jury whether the permitted deviation has been exceeded.⁶

(b) *An Estimated Quantity.* — A specific quantity may be named, however, not to define the subject of the contract, but as an estimate of the probable amount to be

¹ *Stevenson v. Burgin*, 49 Pa. St. 36, 44 (1865).

² *Brawley v. U. S.*, 96 U. S. 168, 172 (1877).

³ *Cross v. Elgin*, 2 B. & Ad. 106 (1831). "The meaning probably was, that if the quantity came to anything near that which had been named, and there was a little excess, the plaintiffs would not inconvenience the defendants by leaving it upon their hands" (p. 110).

⁴ *Creighton v. Comstock*, 27 Ohio St. 548 (1875).

⁵ *Morris v. Levison*, 1 C. P. D. 155, 158 (1876). "I think the direction to the jury has always been that the deviation must not be very large. The difference must be such as people would ordinarily consider as included in the word 'about.' There can be no exact rule of law as to the percentage of difference allowed, but I have known juries often allow in practice 3 per cent." *Cabot v. Winsor*, 1 Allen (Mass.), 546 (1861).

⁶ *Clapp v. Thayer*, 112 Mass. 296 (1873).

supplied. Such is the case where the parties agree upon the purchase and sale of a particular lot of iron, estimated by the buyer "at about 150 tons," and by the seller at that "or more," but which contained only 44 tons;¹ or of 880 cords of wood, more or less, as shall be determined to be necessary by the post commander for the current year's supply for the garrison of his post;² or of the whole of the steel for the Forth Bridge, "the estimated quantity to be 30,000 tons, more or less;"³ or of all the steers and dry cows on the seller's range, and to be acquired under certain contracts, estimated at 6,500 head, more or less.⁴

In each instance the quantity is specified, not for the purpose of making it an essential term of the contract, but by way of stating what the parties "understood to be the fact."⁵ The substantial engagement, in the absence of fraudulent representations, is to supply the particular lot of iron, the year's supply of wood as determined by the post commander, the whole of the steel for the Forth Bridge, whatever the quantity, and all the steers and dry cows on the seller's range or acquired under the described contracts, however numerous.

(c) *Contract for a "Cargo."* — The quantity of goods which the seller must supply under a contract for "a cargo," generally depends upon the circumstances of each case. If the parties use the term with reference to a particular ship, the subject of the contract is the quantity of the described goods which that ship will safely carry;⁵ unless a different intention is disclosed by other provisions of the agreement.⁶ When no vessel is designated, and no

¹ *McLay v. Perry*, 44 L. T. (N. S.) 152 (1881).

² *Brawley v. U. S.*, *supra*.

³ *Tancred v. Steel Co.*, 15 App. Cas. 125, 135 (1890).

⁴ *Morris v. Wibaux*, 159 Ill. 627, 643, 644 (1896).

⁵ *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.), 589 (1856).

⁶ *Bourne v. Seymour*, 16 C. B. 337; 24 L. J. C. P. 207 (1855).

reference is made to the size of the cargo, the seller is probably bound to supply a full cargo by a vessel usually engaged in transporting goods of the agreed kind over the stipulated route.¹ Ordinarily, however, if no vessel is designated, the agreement contains, in addition to the term "cargo," some specification of quantity, as "a cargo of barley of about nine thousand bushels."¹ It then becomes necessary to decide whether the subject of the contract is the entire load of the vessel by which the goods are in fact shipped, or whether it is the quantity specified.

The English courts have generally construed contracts of this kind to call for "the entire quantity of goods loaded on board a vessel on freight for a particular voyage."² It is said, "There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. Such a contract gives him the complete control of the vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of other persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale at the same place and at the same time with his." It also saves him from danger of being "required to pay freight for the whole cargo, before he could obtain possession of what was his own."³

This view has been taken by our courts.⁴ The head-note to the case last cited is misleading. The court did not hold that "a contract for the sale of a cargo of from seven hundred to eight hundred tons of sugar to be shipped from

¹ *Flanagan v. Demorest*, 3 Robt. (N. Y.) 173, 181, 182 (1865).

² *Borrowman v. Drayton*, 2 Exch. Div. 17, 19 (1876).

³ *Kreuger v. Blanck*, L. R. 5 Ex. 179, 184 (1870).

⁴ *Flanagan v. Demorest*, *supra*; *Standard Sugar Refinery v. Castano*, 43 Fed. 279 (1890).

a certain port is fulfilled by the delivery of only seven hundred tons, though shipped from said port as part of a cargo of eight hundred and forty-one tons," but that "as the defendants might have performed their contract by shipping a cargo of seven hundred tons, in assessing damages for a breach of the contract, they may select that alternative which is least burdensome to them;" and that, as plaintiff received seven hundred tons at the contract-price, although without prejudice to its right, if any, to demand the delivery of the remainder of the cargo of eight hundred and forty-one tons, plaintiff could not recover any damages. But the court expressly declares, "If the price of sugar had fallen instead of advanced, the plaintiff might have declined to receive any part of the cargo, on the principle that a cargo means the entire load of the ship which carries it; and that a contract for a cargo of from seven hundred to eight hundred tons is not performed if more or less than that quantity is delivered."

7. *Goods must not be mingled with Others.*—The seller does not supply the agreed chattel when he tenders an article answering the contract description so mixed with other goods that the buyer incurs the risk of being charged with an acceptance of all, or is put to any difficulty in separating it, or is subjected to any liability for the care of the other goods.¹ Nor does the seller improve his position by offering to pay the buyer for any trouble or expense incurred in separating the goods which conform to the contract from the others.² The buyer has a right to stand upon the original contract, and is not bound to make a new one.

¹ *Levy v. Green*, 28 L. J. Q. B. 319, 320 (1859); *Tarling v. O'Riordan*, L. R. 2 Ir. 82, 87 (1878); *Hoffman v. King*, 58 Wis. 314, 317 (1883). "There should be such an offer of delivery by one party that the other party could intelligently accept or reject it, without anything required to be done by him involving delay, labor, and expense."

² *Walker v. Davis*, 65 N. H. 170; 18 At. 196 (1889).

(a) *Modification of this Rule in many Jurisdictions.* — In jurisdictions which approve the doctrine of *Kimberly v. Patchin*,¹ the seller may satisfy his contract obligation by furnishing the specified quantity of goods as a part of a larger bulk of uniform kind and quality, where the act of separation throws no additional burden on the buyer,² or when the terms of the contract³ or the prior dealings of the parties⁴ warrant this mode of performance.

8. *Seller engages for Inspection by Buyer.* — Whether the goods furnished by the seller are the goods agreed upon is not determinable by him alone. If it were, he would have it in his power to force upon the buyer goods without the latter's consent. Clearly the sale contract gives the seller no such right. On the other hand, it binds him "to do an act which he cannot completely perform without the concurrence of the" buyer;⁵ and it entitles the buyer to reject the goods if they do not conform to the agreement.⁶ This right cannot be exercised unless the buyer can inspect the goods. Accordingly, in every case of sale by verbal description or by sample, the seller impliedly engages that the buyer shall have a reasonable opportunity to inspect the goods, in order to discover whether they are the goods agreed upon.⁷ The time within which inspection is to be made, as well as the place of inspection, may be expressly agreed upon. In such cases the parties must abide by their stipulations.⁸ Whether a reasonable opportunity for

¹ *Kimberly v. Patchin*, 19 N. Y. 330 (1859).

² *Brownfield v. Johnson*, 128 Pa. St. 254 (1889).

³ *Lockhart v. Bonsall*, 77 Pa. St. 53 (1874) (five thousand barrels of oil in bulk-cars to be pumped from cars by purchaser).

⁴ *Iron Cliff Co. v. Buhl*, 42 Mich. 86 (1879).

⁵ *Startup v. Macdonald*, 6 Man. & G. 593, 610 (1843).

⁶ *Groetzinger's Sons v. Kann*, 165 Pa. St. 578; 30 At. 1043 (1895).

⁷ *Lorymer v. Smith*, 1 B. & C. 1 (1822); *Pope v. Allis*, 115 U. S. 363; 6 Sup. Ct. 69 (1885).

⁸ *Potter v. Lee*, 94 Mich. 140; 53 N. W. 1047 (1892).

inspection has been afforded may depend upon custom.¹ Ordinarily, however, it is a question of fact "to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the vendor from delay, as the convenience and necessities of the vendee."²

(a) *Place of Delivery is generally the Place of Inspection.* — Although the place of inspection, in the absence of special agreement or custom, is presumably the place of delivery,³ yet the circumstances may show that such place would be an unreasonable one,⁴ or that the parties did not contemplate an inspection there.⁵ "The ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, is one of the most frequent commercial transactions. It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to purchasers, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."⁶

¹ *Sanders v. Jackson*, 2 C. & K. 557 (1848) (a custom of the Liverpool corn-market that inspection must be made on the day of sale). *McLennan v. McDermid*, 52 Mich. 379 (1883) (customary place of inspection was St. Ignace and not place of delivery).

² *Pierson v. Crooks*, 115 N. Y. 539, 551 (1889).

³ *Brownlee v. Bolton*, 44 Mich. 218 (1880) (timber to be delivered on rail of vessels to be furnished by buyer). *Perkins v. Bell* (1893), 1 Q. B. 193 (grain to be delivered by the grower at a designated railway station, from which point it was to be shipped by the buyer to various customers).

⁴ *Grimoldby v. Wells*, L. R. 10 C. P. 391, 395 (1875) (tares to be sent part way in seller's cart and then transferred into buyer's cart by latter's servant. *Held*, not reasonable to compel buyer to examine them at half way of the journey).

⁵ *Pierson v. Crooks*, 115 N. Y., at pp. 548, 549, 22 N. E. 349 (1889) (iron ordered by New York merchants from Liverpool dealers through New York agents of latter, to be delivered free on board at

The circumstances may be such that no question of fact for the jury is involved ; as where the goods are tendered in closed casks,¹ or at an hour which is unquestionably seasonable,² or as clearly unseasonable.³

(b) *Reasonable Opportunity of Inspection.* — While the seller is bound to afford a reasonable opportunity for inspection, he is under no duty to do more. Upon the sale of a ship which is afloat, the seller is not bound to place the vessel in a dry dock in order that the buyer can there examine her.⁴

(c) *Inspection may necessitate Use of Property.* — In some cases a reasonable inspection of the goods necessitates such a dealing with them as would ordinarily indicate a final acceptance, as where lumber is sent in box cars, and an examination cannot be made without unloading, measuring, and piling it.⁵ Reasonable inspection may extend even to the destruction of a portion of the goods. If the buyer cannot determine whether an article is “the best commercial whiting,” without using a portion of it, he has the right to use “so much thereof as, under all the circumstances, may become actually necessary for that purpose without liability for its value.”⁶

When the buyer, however, can determine the non-conformity of the goods to the contract, without consuming any of them, his use of a portion, even for the purpose of providing evidence of unfitness, is in excess of his

Liverpool, but shipped on steamers selected by sellers, and no notice given of shipment in time to enable buyers to inspect in Liverpool).

¹ *Isherwood v. Whitmore*, 11 M. & W. 347 (1843).

² *Startup v. Macdonald*, *supra*.

³ *Croninger v. Crocker*, 62 N. Y. 151 (1875).

⁴ *Lincoln v. Gallagher*, 79 Me. 189 ; 8 At. 883 (1887).

⁵ *Holmes v. Gregg*, 28 At. 17 ; 66 N. H. 621 (1890).

⁶ *Whiting Co. v. White Lead Works*, 58 Mich. 29, 36 ; 24 N. W. 881 (1885).

right of inspection, and will preclude him from rejecting them.¹

(d) *Transfer of Title may precede Inspection.*—While the seller's engagement to afford the buyer a reasonable opportunity for inspection is a condition precedent to the transfer of title, ordinarily, the circumstances of the case may show that it is not to have such effect. If the transaction is one of "sale or return,"—that is, a present sale with an option in the buyer to return the goods if upon inspection they do not conform to the contract stipulations,—the seller's engagement can operate only as a condition subsequent.

(e) *Example of Sale or Return.*—In a recent Iowa case,² the court was called upon to determine whether or not an express stipulation by the seller that the buyer might inspect certain liquors, after their receipt, and return them if they were not as represented, operated to prevent the transfer of title until inspection could be made. This was dealt with as "wholly a question of intention, to be arrived at from the contract and the acts and conduct of the parties." After considering the terms of the contract and the acts of the parties thereunder, the court declared: "We are satisfied from the fact that the drayman, who must be considered as plaintiffs' (buyers') agent, paid the freight on these liquors, took them from the carrier and delivered them to plaintiffs, and from the further fact that the plaintiffs credited defendants with the liquors as soon as they received the bills for them, which was in advance of the delivery of the goods, with the understanding that they were to have credit for such as might be returned, that both parties intended title to pass when the goods were

¹ *Cream City Glass Co. v. Friedlander*, 84 Wis. 53; 54 N. W. 28 (1893).

² *Wind v. Iler & Co.*, 61 N. W. 1001; 27 L. R. A. 219; Ia. (1895).

delivered to the railroad company at Omaha, Neb., for transportation to Ottumwa; and that the sale was not one on trial or on approval, or if satisfactory to plaintiffs, but rather a completed sale, with an option in plaintiffs to return them if they did not meet the test plaintiffs proposed to give them."

(f) *Conditional Title before Inspection.* — There is authority for the proposition that, whenever the buyer authorizes the seller to appropriate goods to the contract, title may pass conditionally at the time of their appropriation, although the buyer has the right of inspection upon their receipt, and is entitled to reject them if they do not conform to the contract. The following extract from a recent New York decision fairly presents this view: "It is said that on the delivery of the iron on shipboard at Liverpool the title vested in the plaintiffs, and that the vesting of the title in the vendees implies an acceptance, and is inconsistent with the alleged right of inspection and rejection on its arrival in New York. There can be no doubt that on delivery to the carrier of iron corresponding with the contract the title would immediately vest in the purchasers, and the iron would thereafter be at their risk. Nor is there any doubt of the general rule that delivery of goods corresponding with the contract is a condition precedent to the vesting of the title in the vendee. But assuming that the title to the iron for some purposes vested in the plaintiffs on delivery to the steamers, it was, as between the vendors and vendees, a conditional title subject to the right of inspection and rejection for inferior quality on arrival at New York. The circumstances strongly confirm the view that the parties did not contemplate that the right of inspection should be exercised at Liverpool."¹

¹ *Pierson v. Crooks*, 115 N. Y. 539, 548 (1889); cf. *Alden v. Hart*, 161 Mass. 576; 37 N. E. 742 (1894). *Campbell on Sales* (2d ed.), 516.

(g) *Absolute Title before Inspection.*—The parties may agree that title shall pass absolutely before inspection. If they do so agree, the seller's engagement for inspection cannot have the effect of a condition precedent, suspending the vesting of title in the buyer; nor of a condition subsequent, warranting him in revesting title in the seller; but it can operate only as a collateral agreement, enabling the buyer to ascertain what damages he has suffered "in consequence of the inferiority of the goods."¹

Mr. Benjamin's criticism of *Heyworth v. Hutchinson* is based upon a strange misconception of the case. He says it compelled the buyer "to accept the goods, although the property had not passed to him, although he had not had an opportunity of inspection before purchase, and although the goods were much inferior in quality to the warranty in the written contract."² But all of the judges based their opinions upon the fact that the agreement was a bargain and sale. It was assumed that the property passed by force of the contract; and the only question was whether there was anything in the writing importing a condition that the buyer might reject the goods if not about similar to samples. Their unanimous conclusion was that the writing contained "merely a warranty as distinguished from a condition."

§ 4. Warranties.

Many of the foregoing conditions are frequently called warranties; but the latter term is properly confined to those engagements of the seller which are collateral to the main purpose of the sale contract.³ It was defined

¹ *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447, 451 (1867); *St. Anthony Lumber Co. v. Bardwell Co.*, 60 Minn. 199; 62 N. W. 274 (1895).

² Benjamin on Sales (Bennett's ed. 1892), § 889.

³ *Down v. Fisher*, 1 Cush. (Mass.) 271, 273, 274 (1848); *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 265. "All contracts of sale

by Chief Justice Shaw in these words: "A warranty is a separate, independent, collateral stipulation, on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action."

Whether a particular engagement of the seller is an essential term of the sale contract, and hence a condition, or is collateral to its main purpose of transferring the title and possession of a chattel, and, therefore, a warranty, depends upon the intention of the parties as disclosed by the language of the contract and the attendant circumstances. It is perfectly competent to the parties to agree that any stipulation in the sale contract shall form one of its essential terms. When this agreement is explicit, the task of the courts is easy; but when no express agreement upon this point appears, they are compelled to determine from the entire transaction "whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the 'promisor' a thing different in substance from what the" promisee "has stipulated for; or whether it merely partially affects it, and may be compensated for in damages."¹

with warranty, therefore, must contain two independent stipulations: First, an agreement for the transfer of title and possession from the vendor to the vendee. Second, a further agreement that the subject of the sale has certain qualities and conditions."

¹ *Bettini v. Gye*, 1 Q. B. D. 183, 188 (1876), applying the rule stated by Parke, B., in *Graves v. Legg*, 9 Ex. at p. 716 (1854), where

The earlier cases on this subject were decided upon distinctions so nice and technical that no rule was deducible from them.¹ Later, attempts were made to lay down definite rules for discovering whether the parties intended a stipulation to be a condition or a warranty;² but, being more or less artificial, they did not meet with general acceptance. In this country the courts have declared that in determining the question now under discussion, they "are to be governed, not by technical and artificial rules, but by the true intention of the parties as expressed by the language of the contract."³ This doctrine has received legislative approval in Great Britain.⁴

(A) **Express Warranties.**

It is not necessary that the word "warranty" be used.⁵ Any statement of fact by the seller upon which the buyer rightfully relies as a material inducement to his entering into the sale contract, if not one of its essential terms, is a warranty.

it was held that a stipulation that "the names of the vessels to be declared as soon as the wools were shipped" was a condition or essential term of the contract for the sale of the wools.

¹ *Pordage v. Cole*, 1 Saund. 319, note 2 (ed. 1871, p. 549).

² *Benjamin on Sales* (ed. 1892), § 562 (a modified statement of the rules in the note to *Pordage v. Cole*, *supra*).

³ *Howland v. Leach*, 11 Pick. (28 Mass.) 151, 154 (1831); *Maryland Co. v. Lorentz*, 44 Md. 218, 232 (1875). "Our duty is to construe the contract in evidence by the standard of intention apparent on its face."

⁴ *Brown's Sale of Goods Act*, 49, 50. See the editor's criticism of the English rules of construction and the reasons assigned for not incorporating them in the statute. It is expressly declared in § 11 (1), (b): "A stipulation may be a condition, though called a warranty in the contract."

⁵ *Chapman v. Murch*, 19 John. 290 (1822); *Riddle v. Webb*, 18 So. 323; 110 Ala. 599 (1895).

1. *Fact versus Opinion and Commendation.* — A representation by the seller that certain tobacco which he offered to the buyer was “first and second rate,”¹ or that a railroad bond was “A No. 1,”² has been deemed an expression of opinion, rather than the assertion of a fact. Such puffing statements are to be distrusted by the buyer. This rule of law, it is said, is hardly “to be regretted, when it is considered how easily and insensibly words of expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed.”² The declarations by the seller that certain sheep would shear from three to nine pounds a head, and that the buyer could pay for the sheep by their wool in two years, and have wool left, are matters of opinion,³ but an assertion that the sheep are young and healthy is one of fact.³ Generally, a seller's statements as to the value of his goods are treated as expressions of opinion; but if he declares that they are selling in market at a named price, or that they are the only articles of their kind which can be bought for that price, the buyer may rely on such declarations as statements of fact.⁴

2. *Intention of Seller.* — Whether the seller's statement of fact amounts to a warranty depends not on his undisclosed thought, but upon the impression which his conduct is “calculated to produce upon the mind of the vendee.”⁵

¹ *Towell v. Gatewood*, 3 Ill. 22 (1839); *cf. Hobart v. Young*, 63 Vt. 363; 21 At. 612 (1891).

² *Deming v. Darling*, 148 Mass. 504, 506; 20 N. E. 107 (1889).

³ *Bryant v. Crosby*, 40 Me. 9, 18 (1855). That a young and untried stallion will “make his mark as a foal-getter,” is a matter of opinion and prediction. *Roberts v. Applegate*, 153 Ill. 210; 36 N. E. 676 (1894); but the assertion that a stallion is a reasonable foal-getter is one of fact. *Eyers v. Haddem*, 70 Fed. 648 (1895).

⁴ *Peck v. Jenison*, 99 Mich. 326; 58 N. W. 312 (1894).

⁵ *Hawkins v. Pemberton*, 51 N. Y. 198, 202 (1872).

“If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not.” Such, at least, is the prevailing view, and the only one to be supported upon principle.¹

(a) *Peculiar Views.* — In a few jurisdictions a different doctrine prevails. The Indiana courts hold that a mere affirmation of soundness “is not *per se* a warranty. It is itself only a representation. To give it the effect of a warranty, there must be evidence to show that the parties intended it to have that effect.”²

In a leading Pennsylvania case, it is said, “The naked averment of a fact is neither a warranty itself nor evidence of it. In connection with other circumstances it certainly may be taken into consideration; but the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representation.”³ Judge Gibson deemed this view the only one consistent with the doctrine of *caveat emptor*. Later cases in that State have approved it, because it discourages those who are disappointed in the advantages

¹ Anson on Contracts, Huffcut's ed. p. 169, *p. 137.

² *House v. Fort*, 4 Blackford, 293, 296 (1837). In this case, the buyer asked as to the horse's eyes, and the seller said, “They are as good as any horse's eyes in the world.” Cf. *Kircher v. Conrad*, 9 Mont. 191 (1890) (buyer asked for spring wheat, and when the wheat was shown to him said, “Are you sure it is spring wheat?” and the seller replied, “What do you take me for?” *Held*, not a warranty).

³ *McFarland v. Newman*, 9 Watts, 55 (1839).

expected from a bargain from drowning their "sorrows in the excitement of an action at law."¹

According to Vermont decisions, "to constitute a representation a warranty, it must have been so intended and understood by the parties, both vendor and vendee; or intended by the parties as a part of the contract; or have formed the basis of the contract."²

3. *May include Patent Defects.* — Words of general warranty will not be construed, as a rule, to cover defects which are obvious to the buyer, in the sale of specific chattels. Hence, a warranty of soundness does not extend to a bump on a horse's leg which was seen by the purchaser;³ but it does cover crooked joints and lameness,⁴ or foot-rot,⁵ when the buyer does not in fact inspect the animals and relies on the seller's representation, although he has an opportunity of inspection. "But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect;"⁶ as where the seller warrants sheep to be free from foot-rot, although the buyer has discovered, as he believes, that they have that disease;⁷ or the seller guarantees that the enlargement of a stallion's bag "in no way troubles him,"⁸ or that "the small puff on the inside left hock joint will all disappear entirely."⁹ If, however, the warranty stipulates

¹ *Wetherill v. Neilson*, 20 Pa. 448, 453 (1853); *Mahaffey v. Ferguson*, 156 Pa. 156, 170; 27 At. 21 (1893). In the earlier of these cases, the seller's statement that certain soda-ash then afloat was of 48 degrees strength, English test, was held to be a representation and not a warranty.

² *Enger v. Dawley*, 62 Vt. 164, 165; 19 At. 478 (1890).

³ *Leavitt v. Fletcher*, 60 N. H. 182 (1880).

⁴ *Kenner v. Harding*, 85 Ill. 264, 269 (1877).

⁵ *First Nat. Bank v. Grindstaff*, 45 Ind. 158 (1873).

⁶ *Benjamin on Sales* (Bennett's ed., 1893), § 616.

⁷ *Pinney v. Andrus*, 41 Vt. 631, 641 (1869).

⁸ *Watson v. Rood*, 30 Neb. 264, 276; 46 N. W. 491 (1890).

⁹ *Fitzgerald v. Evans*, 49 Minn. 541; 52 N. W. 143 (1892).

for something which "is physically impossible, and this is so obvious or notorious as to have been presumably in the contemplation of both parties," it is void.¹

4. *The Warranty need not be the Sole Inducement to the Purchase.* — It is enough that it "entered into the contract as an intended element thereof, and as a part of the consideration for the purchase."² But some degree of reliance must be placed on it.³ Even a statement of fact by the seller as to the quality of the article sold, which does not operate at all as an inducement to the purchaser, does not amount to an actionable warranty. If the warranty is given after the sale of the article, it must have a new consideration.⁴

5. *May extend to the Future.* — Although Blackstone understood that a warranty is limited to the state of things existing when the contract is made,⁵ and although a warranty of the quality of chattels is ordinarily confined to their then condition,⁶ there is no reason why the seller may not engage for the future condition of an article; and undertakings of this kind are frequently entered into.⁷ Sometimes these are so qualified as to diminish the liability of the seller; as where he warrants for a limited period⁸

¹ Campbell on Sales (2d ed.), 430; cf. *McCormick v. Kelly*, 28 Minn. 135 (1881).

² *Sherdon v. Kyler*, 87 Ind. 38, 41, 42 (1882).

³ *Harrington v. Smith*, 138 Mass. 92, 98 (1884); *Deyo v. Hammond*, 102 Mich. 122; 60 N. W. 455 (1894).

⁴ *Cady v. Walker*, 62 Mich. 157; 28 N. W. 805 (1886); *White v. Oakes*, 88 Me. 367, 374; 34 At. 175 (1896).

⁵ 3 Bl. Com. 166.

⁶ *Bowman v. Clemmer*, 50 Ind. 10, 14 (1875); *Lord v. Edwards*, 148 Mass. 476 (1889).

⁷ *Osborn v. Nicholson*, 13 Wall. (U. S.) 654 (1871) (warranty that a negro is "to be a slave for life"). *Snow v. Schomacker Manuf. Co.*, 69 Ala. 111 (1881) ("every piano warranted for five years").

⁸ *Chapman v. Gwyther*, L. R. 1 Q. B. 463 (1866).

or stipulates that the buyer shall examine and approve the goods before they are taken from his premises.¹

6. *Province of Court and of Jury.* — If the contract is oral, and the language used by the parties is in dispute or of doubtful significance, a proper question for the jury is presented.² When the facts are undisputed and the language is unequivocal,³ as well as when the contract is in writing,⁴ it is the duty of the court to declare whether a warranty exists.

7. *Oral Warranty cannot be added to a Written Contract.* — If the contract is reduced to writing, that instrument, in the absence of fraud or mutual mistake,⁵ determines the rights of the parties; "nothing which is not found in the writing can be considered as a part of the contract."⁶ But "where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at the termination."⁶ If the writing in which the sale is referred to is a receipt, a mere bill of parcels, or other informal document not in-

¹ Leitch v. Gillette Co., 67 N. W. 352; Minn. (1896).

² Halliday v. Briggs, 15 Neb. 219, 221; 18 N. W. 55 (1883).

³ Holmes v. Tyson, 147 Pa. St. 305; 23 At. 564 (1892). But see Jones v. Quick, 28 Ind. 125-127 (1867), holding that where the language used is not a warranty in terms, whether it was intended as a warranty, "is a question of fact for the jury and not of law for the court." In Lynch v. Curfman, 68 N. W. 5; Minn. (1896), the seller, after making statements which might have amounted to a warranty of quality, upon being asked to warrant, refused to do so. The evidence being undisputed, the court held that there was no question for the jury.

⁴ Scott Lumber Co. v. Hafner Co., 91 Wis. 667; 65 N. W. 513 (1895); Watson v. Beckett, 2 Kans. App. 232 (1896).

⁵ Aultman v. Falkum, 51 Minn. 562; 53 N. W. 875 (1892).

⁶ Kain v. Old, 2 B. & C. 627, 634 (1824); Rodgers v. Perrault, 41 Kans. 385; 21 Pac. 287 (1889); Hobart v. Young, 21 At. 612; 12 L. R. A. 693; 63 Vt. 363 (1891).

tended by the parties "to be a complete and final statement of the whole of the transaction,"¹ it does not preclude evidence of an oral warranty.² Nor does a formal written contract preclude evidence of an implied condition or warranty annexed to it by the usage of trade,³ nor does an express warranty in such contract negative an implied one unless inconsistent therewith.⁴

(B) Implied Warranties.

All of the seller's engagements, which were formerly called implied warranties in England, and which are still called by that name in this country, have been considered under the head of conditions.⁵

§ 5. Buyer's Rights upon Breach of Seller's Engagement.

1. *Against the Seller.* — In case the seller fails to perform any essential term of the sale contract, the buyer may reject the goods and recover such damages⁶ as he has sustained by the seller's breach. Nor is this right of rejection subject to any duty on the buyer's part to return

¹ *Seitz v. Brewers' Co.*, 12 Sup. C. R. 46; 141 U. S. 510, 517.

² Cases in the last two notes.

³ Sale of Goods Act, § 14 (3); *cf.* *Robinson v. United States*, 13 Wall. (U. S.) 363 (1871).

⁴ Sale of Goods Act, § 14 (4); *Wilcox v. Owens*, 64 Ga. 601 (1880). A written warranty of analysis of guano does not negative an implied warranty of its fitness for known use. *Blackmore v. Fairbanks*, 79 Ia. 282, 288-290; 44 N. W. 548 (1890); *Carleton v. Lombard*, 149 N. Y. 137 (1896). Nor is *Case Plow Works v. Niles*, 90 Wis. 590, 604, 605; 63 N. W. 1013 (1895), opposed to this view.

⁵ The only obligations of the seller which are termed implied warranties in the English Sale of Goods Act are those for quiet possession and freedom from encumbrance. § 12. These were discussed in connection with the implied condition as to title. *Supra*.

⁶ *Anson on Contracts* (Huffcut's ed.), p. 368; *Taylor v. Saxe*, 134 N. Y. 67; 31 N. E. 258 (1892).

the goods.¹ “It would be very hard if it were so. By the supposition the vendor has not complied with his contract, and has sent goods which as against the purchaser he had no right to send. Why should he be entitled to impose upon the purchaser, who never bargained for such goods, and who had a right to reject them, the burden of sending them back, possibly for a considerable distance at a considerable expense?”²

(a) *Prompt Action required.* — When the buyer wishes to exercise the right of rejection, he should act promptly and unequivocally.³ If he retains the property for an unreasonable length of time, without objection, or if, while complaining that it does not conform to the contract, he exercises a dominion over it inconsistent with ownership in the seller, he will be held to have accepted it.⁴ Whether the buyer's retention and use of the property amount to an acceptance is a question of fact, and at times a difficult question,⁵ depending in part upon the conduct of the seller,⁵ or upon trade usages.⁶

(b) *Effect of Acceptance.* — As soon as the goods are accepted, the title passes to the buyer, and he cannot thereafter re-vest title in the seller without the latter's consent.⁷ If they are accepted “in full discharge of the contract,” the buyer's rights are satisfied and he cannot thereafter sustain a claim for damages;⁸ but in England,

¹ *Starr v. Torrey*, 22 N. J. L. 190, 196 (1849).

² *Grimaldby v. Wells*, L. R. 10 C. P. 388, 394 (1875); *Alden v. Clark*, 161 Mass. 576, 582; 37 N. E. 742 (1894).

³ *Rosenfield v. Swenson*, 45 Minn. 190; 47 N. W. 718 (1891).

⁴ *Brown v. Foster*, 108 N. Y. 387, 391 (1888).

⁵ *C. & C. Electric Co. v. D. Frisbie Co.*, 66 Conn. 67, 88-91; 33 At. 604 (1895).

⁶ *Doane v. Dunham*, 79 Ill. 131 (1875) (usage among Chicago wholesale sugar-dealers).

⁷ *Sale of Goods Act*, § 53 (1).

⁸ *Underwood v. Wolf*, 131 Ill. 425, 442; 23 N. E. 598 (1890).

and in most of our jurisdictions, he may accept goods which do not conform to the contract, thereby becoming their owner, and precluding himself from subsequently rejecting them, and yet retain his right to damages for their non-compliance with the contract.

The prevailing view is presented in a recent decision as follows: "The fact of acceptance, however, as a matter of evidence, may have great weight on the question of satisfactory or sufficient performance. In the first place, it raises considerable presumption that the article delivered actually corresponded with the agreement. In the next place, it is some evidence of a waiver of any defect of quality, even if the article did not so correspond, evidence of more or less force according to the circumstances of the case. If the goods be accepted without objection at the time, or within a reasonable time afterwards, the evidence of waiver, unless explained, might be considered conclusive. But if, on the other hand, objection is made at the time, and the vendor notified of the defects, and the defects are material, the inference of waiver would be altogether repelled. But acceptance accompanied by silence is not necessarily a waiver. The law permits explanation, and seeks to know the circumstances which induced acceptance. It might be that the buyer was not competent to act upon his own judgment, or had no opportunity to do so, or declined to do so, as a matter of expediency, placing his dependence mainly, as he has a right to do, upon the" engagement "of the seller. Upon this question the facts are generally for the jury under the direction of the court."¹

(c) *A Different View of the Effect of Acceptance.*—According to this view the buyer, by taking title to the property, may transform a promissory condition into a

¹ *Morse v. Moore*, 83 Me. 473, 481; 22 At. 362 (1891); *Northwestern Cordage Co. v. Rice*, 67 N. W. 298; N. D. (1896).

warranty.¹ In some jurisdictions, however, no such election is accorded to the buyer. If the seller's engagement as to the quality of the article is a condition, — that is, an essential term of the sale contract, and not a mere warranty or collateral agreement, — the purchaser by accepting the article deprives himself “of any right to make complaint of its inferior quality,” provided its defects were known to the purchaser, or could have been discovered upon a reasonable inspection.² The right is not lost, however, in case the defects “are such as would not appear upon an inspection to ascertain whether the article delivered corresponded with that described in the contract.”³

(d) *This View leads to Arbitrary Distinctions.* — The courts which deny that a right to damages can survive the buyer's acceptance of goods which do not conform to the seller's description, find it necessary to resort to rather arbitrary distinctions. For example, the seller's engagement to furnish “No. 1 extra foundry pig-iron of the Coplay Iron Co. (Limited) make,” although that language is descriptive of “a grade of pig-iron of certain well-known quality in the market,” is treated as a condition that does not survive acceptance of the goods by the purchaser;⁴ while his engagement to furnish “Powelton coal of same quality and kind as furnished you during the past year” is held to be a warranty and to survive acceptance.⁵

¹ Anson on Contracts (Huffcut's ed.), 183; Sale of Goods Act, § 11 (1) (a); Wolcott v. Mount, 36 N. J. L. 262, 267 (1873).

² Coplay Iron Co. v. Pope, 108 N. Y. 232, 236; 15 N. E. 335 (1888); Parks v. O'Connor, 70 Tex. 377, 390 (1888); McClure v. Jefferson, 85 Wis. 208; 54 N. W. 777 (1893); Talbot Paving Co. v. Gorman, 103 Mich. 403; 61 N. W. 655 (1894).

³ Carleton v. Lombard, 149 N. Y. 137, 153; 43 N. E. 422 (1896); Bierman v. City Mills Co., 151 N. Y. 482; 45 N. E. 856 (1897).

⁴ Coplay Iron Co. v. Pope, 108 N. Y. 232; 15 N. E. 335 (1888).

⁵ Zabriskie v. Cent. Vt. Ry., 131 N. Y. 72; 29 N. E. 1006 (1892). Compare Gaylord Mfg. Co. v. Allen, 53 N. Y. 515, with Fairbank Co. v. Metzger, 118 N. Y. 260.

(e) *Effect of Acceptance* (1) *when Contract is Entire*; (2) *when it is Severable*. — If the contract is entire,¹ the buyer cannot accept a part and reject the remainder of the goods in the absence of an agreement to that effect. By receiving and retaining a portion he transforms the condition into a warranty, and limits himself to a claim for damages.² In case the contract is severable, however, the buyer may accept any class of the goods without affecting his right to reject other classes.³ Whether a particular contract is entire or severable depends upon the intention of the parties as disclosed by all of the facts of the case.⁴

2. *Against Third Parties*. — The rights of the buyer against third parties, who have obtained possession of the goods as a result of the seller's breach of an essential term of his sale contract, depend upon the question whether such breach has prevented title vesting in the buyer. We have seen that the seller's engagement to furnish the agreed article, and also his engagement to afford a reasonable opportunity for inspection, are conditions precedent to his transfer of title to the buyer. Until title has vested in the buyer, the seller has the power to transfer it to a third person who can hold the property to the exclusion of the first contractee; although by so doing the seller subjects himself to damages for a breach of his contract.⁵

¹ *Cahen v. Platt*, 69 N. Y. 348 (1877) (contract for the sale of 10,000 boxes of glass of approved standard qualities).

² Sale of Goods Act, § 11 (1) (c). *Lyon v. Bertram*, 20 How. (U. S.) 149, 154, 155 (1857).

³ *Pierson v. Crooks*, 115 N. Y. 539, 554, 555 (1889) (contract for a specified quantity of iron hoops at a fixed price and a designated quantity of iron sheets at a different price). *Potsdamer v. Kruse*, 57 Minn. 193; 58 N. W. 983 (1894) (contract for ten different styles of neckties, the quantity, description, and price of each style being separately specified).

⁴ Cases in the last three notes and *Young v. Wakefield*, 121 Mass. 91 (1876).

⁵ *Garbarron v. Kreeft*, L. R. 10 Exch. 274 (1875); *Emery's Sons v. Irving Nat. Bk.*, 25 Ohio St. 360 (1874).

On the other hand, as soon as title has vested in the buyer, by his acceptance of the property, even though he might have rejected it because of the seller's breach of a condition precedent, the seller's power, as a rule, to confer rights upon third persons has ceased. Neither such third persons nor the seller can thereafter set up the latter's breach of a condition precedent as against the buyer.¹

In the Colorado case, cited in the last note, the vendor engaged to sell and deliver at the buyer's place of business in Denver certain flour. The flour was shipped by the vendor, but the latter's agent diverted it from the buyer to a third person. The buyer made a demand upon such person for the flour, who refused to deliver it, whereupon the buyer brought an action in replevin therefor. It was held that the vendor had the power to sell the flour to a third person at any time before it was accepted by the buyer; but that if no sale had been made prior to the buyer's acceptance, when he made his demand upon the third person for the flour, such acceptance vested the ownership in the buyer and entitled him to maintain his action. The stipulations in the sale contract, that the flour should be of a particular quality, and that it should be delivered at a prescribed place without charge for freight to the buyer, were declared to be for his benefit, and he could waive compliance with them.

§ 6. Buyer's Rights upon Breach of Warranty.

A breach of this collateral agreement by the seller does not entitle the buyer to return the goods; it gives him only a right to damages, save in a few jurisdictions. Such is the rule, whether this engagement is collateral from the first, or whether, being an essential term of the contract and available as a condition precedent to the

¹ *Hanauer v. Bartels*, 2 Colo. 514, 522 (1875); *Rechten v. McGary*, 117 Ind. 132; 19 N. E. 731 (1888).

buyer, he has taken title to the goods, and, waiving his right to treat the engagement as a condition, can take advantage of it only as a collateral agreement. In either case, the title to the goods, having vested in the buyer with the assent of both parties, cannot be divested by the sole act of either.¹

1. *Right to Damages Only.*—The leading case in the United States upon this subject is *Thornton v. Wynn*,² and in England, *Street v. Blay*.³ In the latter case, all previous decisions were carefully examined by Lord Tenterden, who, after considering the dicta of Lord Eldon and others, that upon a breach of warranty the buyer might “return the goods and bring an action to recover the full money paid,” declared: “It is, however, extremely difficult, indeed, impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. . . . On the other hand, the cases have established that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action; . . . and

¹ *Mondel v. Steel*, 8 M. & W. 858, 870 (1841). “The performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back.”

² 12 Wheat. (U. S.) 183, 193 (1827).

³ B. & Ad. 456, 462 (1831).

there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.”¹

2. *Right to rescind.* — Some of our State courts, however, hold that the buyer may rescind an executed contract of sale for a breach of warranty, and upon seasonably returning the property, may recover the purchase-price, if he has paid it, or may set up such breach as a complete defence to an action for the price, if it is unpaid.

(a) *False and Innocent Warranty confounded.* — It is to be noted, in the first place, that these decisions make no distinction between the buyer's rights upon a breach of warranty and his rights in case of fraudulent representations as to quality. This is apparent from the following extracts: “If there was a fraud in the sale, or an express warranty and a breach of it, in either case the defendant might avoid the contract by returning the ox within a reasonable time.”² “A warranty may be treated as a condition subsequent at the election of the vendee who may, upon a breach thereof, rescind the contract and recover back the purchase-money as in the case of fraud.”³ “He relies upon the warranty, and the breach of it is equally injurious to him, whether the seller acted in good or bad faith.”⁴

(b) *Breach of Warranty as a Tort.* — This anomalous doctrine is to be accounted for, it is believed, by the fact that originally the action for breach of warranty was one in tort. As late as 1839, Chief Justice Shaw declared: ⁵

¹ *Lighburn v. Cooper*, 1 Dana (Ky.), 273 (1833); *Case v. John*, 10 Watts (Pa.), 107 (1840); *Voorhees v. Kellogg*, 2 Hill (N. Y.), 288 (1842); *Allen v. Anderson*, 3 Humph. (Tenn.) 581 (1842); *West v. Cutting*, 19 Vt. 535 (1847); *Wright v. Davenport*, 44 Tex. 164 (1875), *accord*.

² *Perley v. Balch*, 23 Pick. (Mass.) 283, 285 (1839).

³ *Dorr v. Fisher*, 1 Cush. (Mass.) 271, 274 (1848).

⁴ *Marston v. Knight*, 29 Me. 341, 345 (1849).

⁵ *Salem India Rubber Co. v. Adams*, 23 Pick. 256, 265.

“Where there is an express warranty on the part of the defendant, embodied in and made part of the contract of sale, and this warranty is false, case will lie, on the ground that by means of the warranty the buyer is lulled into security and prevented from making any examination.” For this proposition he cited *Williamson v. Allison*,¹ in which Lord Ellenborough used this language: “The warranty is the thing which deceives the buyer who relies on it and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit. . . . The ancient method of declaring was in tort on the warranty broken. . . . No other proof was required to sustain the former mode of declaring than the warranty itself and the breach of it. Here, then, the plaintiff will be equally entitled to recover in tort upon the same proof, by striking out the whole averment of the *scienter*.”

(c) *Failure to distinguish Warranty from Condition*. — In the second place, some of the courts holding the doctrine now under consideration have failed to observe the distinction between a promissory condition and a warranty.² In a leading case, it is asserted that there is no such difference between “the effect of an implied and an express warranty as deprives a purchaser of any

¹ 2 East, 446, 451 (1802). And see argument for defendant in *Bryant v. Isburgh*, 13 Gray (Mass.), 607, 609, 610 (1859), and *Beeman v. Buck*, 3 Vt. 53 (1830).

² *Boothby v. Scales*, 27 Wis. 626, 636 (1871) (condition that the article sold was reasonably fit for the purpose to which it was to be applied); such was the case, too, of *Woodle v. Whitney*, 23 Wis. 55 (1868), and *Manufacturing Co. v. Stark*, 45 Kans. 606; 26 Pac. 8 (1891). In *Sparling v. Marks*, 86 Ill. 125 (1877), the contract, as interpreted by the court, was for the sale and purchase of a pin, which was understood by both parties to be a diamond, when it was in fact a crystal. Clearly, the seller's engagement that the pin was a diamond was not a collateral stipulation of warranty.

legal right of rescission under the latter, which he has under the former.”¹ The transaction, then, before the court was a bargain and sale of a specific chattel — a horse — with an express warranty of soundness. The latter engagement was “a separate, independent, collateral stipulation” which did not suspend “the vesting of the thing sold in the vendee.”² And yet the court was unable to distinguish the case from one where the contract was for the sale by sample of cloves, which were found upon subsequent delivery to be of an inferior species. Here the seller’s undertaking that the bulk should correspond with the sample was clearly an essential term of the sale contract. With respect to such a transaction — a sale by sample — it had been properly held that the seller “certainly undertakes . . . that the thing is the same, generically and specifically, as that which he shows, . . . and if a different thing is delivered, he does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him.”³

(d) *This Fundamental Distinction discarded by a Few Courts.* — The distinction between these two classes of cases, in one of which the seller’s engagement as to quality is a condition precedent to the vesting of title in the purchaser, while in the other it is a stipulation collateral to an executed sale, was clearly stated in *Street v. Blay*,⁴ and is recognized by most courts as fundamental.⁵ It has been deliberately discarded, however, in a few jurisdictions.⁶

¹ *Bryant v. Isburgh*, 13 Gray (Mass.), 607, 611 (1859).

² *Dorr v. Fisher*, 1 Cush. (Mass.) 271, 273, 274 (1848).

³ *Bradford v. Manly*, 13 Mass. 131, 145 (1816).

⁴ 2 B. & Ad. at p. 463.

⁵ *Houghton v. Carpenter*, 40 Vt. 588, 595, 596 (1868).

⁶ *Rogers v. Hanson*, 35 Ia. 283, 287 (1872); *Thompson v. Harvey*, 86 Ala. 519, 521 (1888).

In Louisiana the buyer is entitled to return the goods and regain the price, whether the article is warranted or not, and even though the seller was ignorant of the defects, provided they are such that had they been made known to the buyer he would not have purchased.¹

3. *Rejected Goods must be returned.* — We have seen that the buyer who exercises his right to reject goods pursuant to a condition in his favor, is not bound to return them to the seller. But the courts which accord him the right to reject an article upon a breach of warranty require him to return it. "There must be actual restoration or its equivalent."²

4. *Alternative Rights under Special Agreements.* — If the seller warrants the article and also agrees that it may be returned if it does not possess the warranted qualities, the buyer has the option of returning it, or of keeping it and recovering damages.³ The special agreement may be so framed as to limit the buyer to a return of the property.⁴

§ 7. Seller's Duty to deliver Possession.

Thus far in this chapter we have been concerned mainly with the duties of the seller which are incident to his engagement "to pass the property in the thing sold" to the buyer, and with the correlative rights of the latter. We proceed now to the consideration of the seller's duties growing out of his other principal engagement, "to deliver possession of the article."⁵

1. *Nature of this Engagement.* — It is not necessary that this engagement be expressly stated in the contract.

¹ *Melancon v. Robichaux*, 17 La. (O. S.) 97.

² *Tyler v. Augusta*, 88 Me. 504; 34 At. 406 (1896).

³ *Evers v. Haddem*, 70 Fed. R. 648 (1895).

⁴ *Himes v. Kiehl*, 154 Pa. St. 190; 25 At. 632 (1893).

⁵ *Martineau v. Kitching* L. R., 7 Q. B. 436, 449 (1872).

"The obligation to deliver, if not expressed, is implied,"¹ although in the absence of agreement to the contrary, it is conditioned upon payment by the purchaser. Hence, in case of a bargain and sale, if the seller refuses to allow the buyer to take possession of the purchased article, for which he has paid or offered to pay, the latter may force his way upon the seller's premises and take the property, without committing trespass;² or upon offering performance on his part, may recover the value of the goods.¹ Nor is this engagement of the seller altered by the fact that the goods are on the premises or in possession of a third party. It is still a part of his sale contract that possession shall be delivered,³ free from liens.⁴

2. *Formal Tender not Necessary.* — While the seller does engage to give possession of the goods to the buyer, he is under no duty to send them to him, unless he specially agrees to do so. He performs his obligation by having the goods in readiness for the buyer at the proper time and place, and by giving the latter notice thereof.⁵ Even if he is bound to send the goods to a stipulated place, he need not make a formal tender of them there. "Readiness and willingness to perform the contract, with notice to the " buyer, are the measure of his duty.⁶ Where the

¹ *Gray v. Walton*, 107 N. Y. 254 ; 14 N. E. 191 (1877).

² *Wood v. Manly*, 11 Ad. & E. 34 (1839).

³ *Buddle v. Green*, 27 L. J. Exch. 33 (1857). "Here the plaintiff bought the slates, and although they were in the possession of third persons, it was a portion of the contract that they should be delivered within a reasonable time." *Martin, B.*, p. 34.

⁴ *Davis v. Gilliam*, 14 Wash. 206 ; 44 Pac. 119 (1896).

⁵ *Robbins v. Luce*, 4 Mass. 474 (1808) ; *Hillestad v. Hostetter*, 46 Minn. 393 ; 49 N. W. 192 (1891) ; *Bliss Co. v. U. S. Co.*, 149 N. Y. 300 ; 43 N. E. 859 (1896). In the last-cited case the action was for the contract-price of the goods.

⁶ *Jackson v. Allaway*, 6 M. & G. 942 (1844) (here the action was for damages for non-acceptance). *Smith v. Wheeler*, 7 Oregon, 49

place of delivery is to be designated by the purchaser, the seller discharges his whole duty by notifying the former of his readiness to perform.¹

In jurisdictions which enforce the doctrine of *Bement v. Smith*,² a formal tender of the goods by the seller may be necessary in order to pass title to the buyer and put them at his risk.³

3. *The Place of giving Possession.* — In the absence of an agreement upon this point, possession of specific goods, which are bargained and sold, is to be given "at the place where they are at the time of the sale;"⁴ while possession of goods, which are to be appropriated to the contract after it is made, is to be given at the seller's place of residence or of business. If the goods are to be produced by the seller, his manufactory⁵ or farm⁶ is the place where possession is to be given; if they are goods which he is to procure, they are deliverable at the place of business where he deals in such articles;⁷ and if there is no

(1879) (action for purchase-price, following in this respect the New York rule); cf. *Smith v. Lewis*, 26 Conn. 110, 119 (1857).

¹ *Hunter v. Wetsell*, 84 N. Y. 549, 555 (1881).

² 15 Wend. 493, *supra*.

³ *Roush v. Emerick*, 80 Ind. 551 (1881).

⁴ *Gray v. Walton*, 107 N. Y. 254, 258; 14 N. E. 191. The language of the English statute is: "Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence; provided that if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery." Judge Chalmers notes that this rule was based, not on judicial authority, for there was none, but on ordinary practice and on Art. 342 of the German Commercial Code. *Sale of Goods Act* (2d ed.), 60, 61.

⁵ *Bliss Co. v. U. S. Incandescent Co.*, 149 N. Y. 300, 305; 43 N. E. 859 (1896).

⁶ *Lobdell v. Hopkins*, 5 Cow. (N. Y.) 516 (1826).

⁷ *Janney v. Sleeper*, 30 Minn. 473, 475; 16 N. W. 365 (1883).

such place of business, then at his residence.¹ “The law judges of the place according to the nature and subject-matter of the things to be performed. In other words, the law supposes the implied understanding of the parties, and it is its province to advance their will in a fair and honest contract.”¹

(a) *Cumbrous Articles and Portable Goods.* — In some jurisdictions it is held that if the time of giving possession is fixed by the parties, but the place is not designated, the duty of the seller varies with the nature of the goods. If they are portable he must offer possession of them at the vendee's residence;² but if they are cumbersome, he “is not bound to carry them to the vendee, but must seek him a reasonable time before the day of delivery, to ask him to appoint a place of delivery.”³ This obligation to tender the goods or to seek for the designation of a place of delivery is rested upon the fact that the seller, in this class of cases, “must become the first actor, in order to fulfil his contract,” while if neither time nor place is stipulated, the buyer is to be the first “actor, by going to demand the articles.”

(b) *When the Parties name a Definite Place.* — If the parties agree on a particular spot as the place where possession is to be given, the seller is bound to have the goods there, unless he can show a legal excuse for non-performance.* A change in the condition of the specified

¹ *Wilmouth v. Patton*, 2 Bibb (Ky.), 280, 282 (1811).

² *Goodwin v. Holbrook*, 4 Wend. 377 (1830) (salt to the value of \$1,000, packed in barrels, was deemed portable). *Barr v. Myers*, 3 W. & S. (Pa.) 295 (1842) (two thousand mulberry-trees were treated as portable goods).

³ *Allen v. Woods*, 24 Pa. St. 76 (1854) (fifty thousand bricks were deemed cumbersome articles).

⁴ *Hatch v. Oil Co.*, 100 U. S. 124, 135 (1879); *cf.* *U. S. v. Peck*, 102 U. S. 64 (1880) (seller's failure to perform was due to buyer's acts).

place is not necessarily an excuse.¹ Their agreement upon a particular place of delivery need not be expressly stated in the contract; it may be disclosed by extrinsic facts, such as the business usages of the parties,² or their acts under the contract;³ in short, by the circumstances of the case.

(c) *When they designate a Locality, leaving Exact Spot to be fixed.* — Oftentimes the contract designates a locality as the place of delivery, leaving the specification of the exact spot to one of the parties. It then becomes his duty to notify the other of the selected place, before that other can be treated as in default.⁴ When the buyer has the right of selection and fails to exercise it, the seller may appoint the spot;⁵ and, by delivering the goods there with notice to the buyer, may put them at his risk, if the transaction is one of bargain and sale. The same result

¹ Howard v. Miner, 20 Me. 325, 330 (1841).

² Bronson v. Gleason, 7 Barb. (N. Y.) 472, 475, 476 (1849). "We also know . . . that the plaintiffs were dealers in the article of salt; and had, previous to the date of the contract in question, purchased salt of the defendant, which he had transported in boats, and by himself and hands delivered the same to the plaintiffs upon their dock at Oswego."

³ Field v. Runk, 22 N. J. L. 525, 529 (1850). "A part of the grain bargained for was actually delivered there by one of the defendants; and the other defendant, when he had resolved to violate the contract, declared he would not take it. Take it where? Why, by fair inference, where he had already taken the 98 bushels, — to the plaintiff's mills. There can be no doubt as to the place of delivery contemplated by the parties to this contract."

⁴ Davies v. McLaen, 28 L. T. (N. S.) 113; 21 W. R. 264 (1873) (one hundred tons lard ex quay or warehouse in Liverpool; the seller was bound to give the buyer notice of the particular quay or warehouse from which delivery was to take place). Kunkle v. Mitchell, 56 Pa. 100 ("on the cars at Indiana station 75,000 feet of lumber;" the buyer was bound to notify the seller that cars were at the station).

⁵ Lincoln v. Gallagher, 79 Me. 189 (1887); 8 At. 883 (bargain and sale of a ship to be delivered in Portland Harbor).

would follow, though the transaction were a contract to sell, provided it were within a jurisdiction where the doctrine of *Bement v. Smith*¹ obtains.

4. *Time of giving Possession.*—If this is not fixed by the express terms of the contract, or is not fairly inferable from the facts of the case, possession is to be given or taken within a reasonable time. What is a reasonable time is a question of fact depending upon all the circumstances of the case.² “There is, of course, no such thing as a reasonable time in the abstract. It must always depend upon circumstances,” and “the only sound principle is that the reasonable time should depend on the circumstances which actually exist,” provided that “those circumstances, in so far as they involve delay, have not been caused or contributed to by the” party charged with undue delay.³

(a) *Delay due to Extraordinary Causes.*—Accordingly, it has been held that if no time of delivery is agreed upon, the seller is not responsible for a delay of several weeks beyond the usual time of making delivery of such goods as the contract calls for, in case this delay is due to strikes or other extraordinary causes beyond his control.⁴ “The principles which must govern” the decision of such a case “are as old as the law of contract. . . . The condition of reasonable time has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding

¹ 15 Wend. 493 (1836).

² *Bagby v. Walker*, 78 Md. 239, 247 ; 27 At. 1033 (1893). If facts are undisputed and but one inference possible, the question may be disposed of by the court. *Pinney v. Railroad*, 19 Minn. 251 (1872). Under a contract for 2500 cigars “to be shipped at once,” the seller cannot wait 19 days before shipping. *Fisher v. Boynton*, 87 Me. 395 ; 32 At. 995 (1895).

³ *Hick v. Raymond* (1893), A. C. 22, Lord Ch. Herschell, at p. 29.

⁴ *Taylor v. Maclellan*, 19 Sess. Cas., 4th series, 10 (1891).

protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.”¹

(b) *Reasonable Hour*. — If the contract fixes the day of delivery, but does not specify the hour, possession must be given at an hour which is reasonable, having regard to the circumstances of each case.²

(c) *Time of Delivery an Essential Term*. — A stipulation, in a contract of sale, for the delivery of the goods at a specified time, is an essential³ and not a collateral term. If the parties bargain for “No. 1 Eglinton Scotch pig-iron for shipment by sail in December, 1879,” their contract is not for iron of any kind, nor for No. 1 Eglinton Scotch pig-iron simply, but for such iron shipped at the stipulated time. If the seller delivers the described iron at any other time than that specified, the buyer has a right to say, The article you tender is not the article I agreed to buy.⁴ In the case last cited Cairns, L. C., said: “It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer” (to the question why time of shipment should be deemed an essential term). “But, if necessary, a further answer is obtained from two other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased,

¹ *Hick v. Raymond*, *supra* (Lord Watson, at p. 32), affirming *Hick v. Rodocanachi* (1891), 2 Q. B. 626, which had been followed in *Taylors v. Maclellan*, *supra*.

² *Croninger v. Crocker*, 62 N. Y. 151, 158 (1875). Sale of Goods Act, § 29 (4). This provision annuls the technical rules laid down in *Startup v. Macdonald*, 6 M. & G. 593 (1843).

³ *Ellinger v. Comstock*, 13 Ind. App. 696; 41 N. E. 351 (1895).

⁴ *Hill v. Blake*, 97 N. Y. 216, 220, 221 (1884); *Bowes v. Shand*, 2 App. Cas. 455, Blackburn, L., 480, 481.

and to be ready with funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. . . . There is still another explanation, . . . that these contracts were made for the purpose of satisfying and fulfilling other contracts.”

(d) *Strict Performance may be waived.* — While the buyer has a right to insist upon having possession of the goods at the agreed time, and may reject them if offered at a different time, he can waive strict performance by the seller.¹ Mere receipt of a part of the goods, without knowledge of the seller's inability to supply all within the stipulated period, will not constitute a waiver,² and if the remainder is offered after the expiration of such period, the buyer may reject the whole. Nor, in most jurisdictions, will the mere acceptance of the goods, after the time fixed in the contract, operate as a waiver of the seller's breach of this term. The buyer may accept the belated goods, transfer the condition precedent into a warranty *ex post facto*, and claim damages for the breach of what is now a collateral term of the contract.³

(e) *Instalment Deliveries: Entire not Divisible Contracts.* — Oftentimes the sale contract provides for the delivery of goods by instalments, and for separate payments therefor. In such cases, the mere fact that the deliveries and payments are to be made at different dates, extending over a considerable period of time, does not split up the agreement into separate contracts for each in-

¹ *Supra*, p. 63.

² Nightingale v. Eissman, 121 N. Y. 288, 292, 293; 24 N. E. 475 (1890).

³ Bagby v. Walker, 68 Md. 239, 244, 245; 27 At. 1033 (1893), and *supra*, p. 128.

stalment.¹ It is true the parties may so frame their agreement as to resolve it into several distinct contracts.² On the other hand, they may expressly declare that a breach of any instalment obligation by one shall give to the other party the right to rescind the entire agreement.³ But in the absence of any such express stipulations, the courts generally construe an instalment contract as an entire and not as a divisible contract.⁴

Accordingly, a breach as to any instalment may give the party not in default a right to repudiate the whole contract, if the breach relates to the first instalment; or, if it is connected with a subsequent one, to repudiate the contract so far as it is unperformed.

(f) *Unsatisfactory State of Authorities.* — It must be admitted that judicial authority upon this subject is in an unsatisfactory state on both sides of the Atlantic; and that British legislation has failed to provide a complete solution of the difficulty for that country.

(g) *How Far they are Agreed.* — Upon one proposition, however, the courts appear to be in accord. If the breach is of such a nature as to show an intention on the part of the one committing it to renounce the contract,⁵ or

¹ *Mersey Steel & Iron Co. v. Naylor*, 9 App. Cas. 434, 439 (1884); *Norrington v. Wright*, 115 U. S. 188; 6 Sup. Ct. 12 (1885). In some jurisdictions a different view prevails. See *Myer v. Wheeler*, 65 Ia. 390, 396 (1884). This case was decided before the report of either of the foregoing cases appeared, and was founded in part on the authority of the note to *Norrington v. Wright* (at circuit), in 21 Am. L. R. (N.S.) 395.

² *Morgan v. McKee*, 77 Pa. St. 228 (1874) (an agreement for the sale of four thousand barrels of oil was split up into eight separate written contracts for monthly deliveries of five hundred barrels each).

³ *Cherry Valley Iron Works v. Florence Iron Co.*, 64 Fed. Rep. 569 (1894).

⁴ *Rugg v. Moore*, 110 Pa. St. 236; 1 At. 320 (1885).

⁵ *Otis v. Adams*, 56 N. J. L. 38; 27 At. 1092 (1893).

his inability to perform,¹ the other party may decline further performance. They are agreed also that, if the language of the contract, or the circumstances of the case, disclose a mutual intention that a breach with respect to any instalment shall give to the party not in default a right to withhold further performance, such intention is to be respected and carried out.

(h) *Default must amount to a Renunciation of the Contract.* — But in many jurisdictions the courts refuse to recognize a right to repudiate a continuing contract for the breach of an instalment provision in any other case. This appears to be the rule in Britain, notwithstanding considerable authority to the contrary. In a recent decision of the House of Lords, it is said, “You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.”² Accordingly, it was held that the failure of the buyer to pay promptly for one instalment, his postponement being

¹ *Morgan v. Bain*, L. R. 10 C. P. 15 (1874). Insolvency, unaccompanied by any subsequent intention to perform the contract on the part of the insolvent or his assignee, may justify the other party in concluding that the insolvent has abandoned the contract (p. 28). *Hobbs v. Columbia Co.*, 157 Mass. 109; 31 N. E. 756 (1892); *Florence Mining Co. v. Brown*, 124 U. S. 385; 8 Sup. Ct. R. 531 (1888). The mere insolvency of one party, however, is not equivalent to a rescission or a breach, although the vendee's insolvency does relieve the vendor from his agreement to give credit, and entitles him to cash on delivery. *Pardee v. Kanady*, 100 N. Y. 121; 2 N. E. 885 (1885).

² *Mersey Co. v. Naylor*, 9 App. Cas. 434; Lord Ch. Selborne, at pp. 438, 439, and see opinion of Lord Watson.

in good faith and due to erroneous legal advice, did not entitle the seller to refuse further deliveries.

This rule has been adopted by some American courts.¹ In the case last cited, the seller had failed to deliver the first of three instalments of silk, owing to the lateness of the crop, but he showed no intention to abandon the contract. On the other hand, he expressed a willingness to compensate the buyer for this default and to deliver the other instalments on time. The majority of the court held that the delivery of one instalment—even of the first—was not a condition precedent to the continuing obligation of the contract, and that a breach as to any instalment, unless amounting to an intentional abandonment of the contract by the party in default, did not give the other party the right to repudiate the contract. In an able dissenting opinion, Van Syckel, J., declared that this rule perverts “a contract for goods in instalments into an agreement to engage in a succession of lawsuits, if the vendor so elects, for such damages as the purchaser may be able to recover, as a substitute for what he expressly bargains for, and during all this period the purchaser cannot safely secure his needed supplies elsewhere, because he cannot know until the due days arrive whether the vendor will make further default.”

(i) *Breach going to the Whole Consideration.*—In other jurisdictions it is held that a breach of an instalment contract, which does not show abandonment by the party in default, will not entitle the other party to repudiate the contract unless the breach goes to the whole consideration.² The reasons for this view have been admirably stated by an eminent English judge: “Such a contract for the successive deliveries of goods at a sum per meas-

¹ Gerli v. Poidebord Silk Co., 57 N. J. L. 432; 31 At. 401; 30 L. R. A. 61 (1894).

² Osgood v. Bander, 75 Ia. 550, 558; 39 N. W. 887 (1898).

ure, is a somewhat modern kind of contract, but it has now been in existence for many years. It has been frequently considered, and the rule with regard to its construction seems to me to be this, that when the deliveries are to be so made, and the price of each to be so determined, then, inasmuch as the failure to perform one of the deliveries can be satisfied by damages, the failure in respect of one delivery does not prevent the party from having the other deliveries. . . . The courts have not laid down that doctrine as an abstract proposition of law, but they have gathered it from the course of business amongst merchants.”¹

(j) *Breach of any Essential Term of an Instalment Contract.* — Still a third rule has been laid down by other courts, to the effect that the breach of an essential term of an instalment contract, whether evincing an intention to abandon it or not, gives to the party not in default a right to refuse further performance on his part, and to treat it as repudiated. This rule appears to be sound in principle, to be supported by the weight of authority in this country, and to be gaining in favor. If the breach consists in failure to deliver the first instalment, it is clearly one which goes to the root of the agreement;² “it would in most cases entirely frustrate the object of the contract.”³ The same view has been taken of the breach of a subsequent instalment,⁴ even where the defaulting party claimed in good faith not to be committing a breach.⁵

¹ *Honck v. Muller*, 7 Q. B. D. 92, 103, 104. Dissenting opinion by Brett, L. J.

² *Norrington v. Wright*, 115 U. S. 188; 6 Sup. Ct. 12 (1885); *Pope v. Porter*, 102 N. Y. 366; 7 N. E. 304 (1886).

³ *King Philip Mills v. Slater*, 12 R. I. 82, 85 (1878).

⁴ *Cresswell v. Martindale*, 63 Fed. R. 84, 86; 27 U. S. App. 277 (1894). “Nor was the vendee’s breach of this contract slight or in an

⁵ *Cf. Winchester v. Newton*, 2 Allen (98 Mass.), 492, 495 (1861).

(k) *Is Time of Payment an Essential Term of Instalment Contracts?* — In England, the engagement of the buyer to pay for goods at a fixed time is not treated as of the essence of the contract, unless the parties have disclosed a different intention by the terms of their agreement.¹ In this country, the time of payment fixed in mercantile contracts is generally deemed an essential term; and a breach of it is attended by the consequences which follow the breach of an engagement to deliver.² Such is the rule in Scotland also, where, it is said, the courts pay "greater regard than in England to the unity of the contract and the mutuality of its obligations."³

Turnbull v. McLean, 1 Sess. Cas. 730, 4th series (1874), is very instructive on this point. The purchaser made default in paying for an intermediate instalment, claiming a right to deduct certain demurrage charges from this price instalment, whereupon the seller refused to make further deliveries. The buyer contended that the settlement of the price of one month's deliveries was a matter altogether apart from the obligation to deliver in subsequent months; that the time of payment was not of the

immaterial part. It was substantial, and went to the very root of the contract. It consisted in their refusal to accept 282 cattle" (the fourth instalment), "and to pay \$7,896 for them, at the time and place they agreed to accept and pay for them under the contract. These cattle had been gathered by the vendor from a range 40 miles square, by the labor of many men for many days, and driven to the railroad station to be delivered to the vendees."

¹ Sale of Goods Act, § 10; Mersey Steel Co. v. Naylor, *supra*, p. 145.

² Stokes v. Baars, 18 Fla. 656 (1882); Barnes v. Denslow, 30 N. S. R. 315, 318 (1890); K. S. Co. v. Inman, 134 N. Y. 92; 31 N. E. 248 (1892); Hess Co. v. Dawson, 149 Ill. 138; 36 N. E. 557 (1894). Cf. Miller v. Steen, 30 Cal. 402, 408 (1866), holding that time of payment is not of the essence of the contract in case of a conditional sale, where title remained in seller, who retook the property and retained the payments which had been made.

³ Brown, Sale of Goods Act, pp. 151, 152.

essence of the contract. But the court declared this position untenable; that the time of payment was not less of the essence of the contract than the payment itself; that “by the law of Scotland (1) stipulations on either side, in mutual contracts, are the counterparts of and the consideration given for each other; (2) that a failure to perform any material or substantial part of the contract by one will prevent him from suing the other for performance; (3) that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether, — except so far as it has been performed.”¹ In a concurring opinion, Lord Nevers added, “To say that, where a contract is to be implemented by instalments, the furnishings for one month are totally independent of the next, is an egregious fallacy and contrary to the dealings of ordinary life. In a contract of labor, in which monthly payments are stipulated, could it be said that if the servant has not received payment for the last month, that has nothing to do with his obligations to work during the next month?”

(1) *Right to Rescind may be Waived.* — The right to rescind an instalment contract, because of the other party's default, may be waived if the buyer continues to receive and retain partial instalments;² and if, while claiming damages for previous breaches, he accepts later deliveries, his right of rescission is lost.³ Likewise the seller may lose his right to rescind by insisting upon the purchaser's accepting and paying for instalments which the latter has failed to take, thus showing his election to continue the contract in force.⁴

¹ Lord Justice-Clerk, at p. 738.

² *McNaughton v. Cassady*, 4 McLean (U. S. Cir. C.) 530 (1849).

³ *Miller v. Moore*, 83 Ga. 684, 693; 10 S. E. 360 (1889).

⁴ *Providence Coal Co. v. Cox*, 35 At. 210, 211 (R. I.) (1896), *semble*.

5. *Manner of giving Possession.* — What the seller is bound to do in the performance of his duty to give possession to the buyer, depends in each case, as a rule, “on the nature of the thing, and the relation of the parties to it at the time. . . . In all cases the essence of delivery is that the deliveror, by some apt and manifest act, puts the deliverer in the same position of control over the thing, either directly or through a custodian, which he held himself immediately before the act.”¹

At present we are concerned with but one species of delivery: that which the seller must make in order to perform his engagement to give possession to the buyer. What constitutes delivery under the Statute of Frauds has been discussed already: what acts of delivery will divest the vendor's lien, or prevent his stopping the goods *in transitu*, will be considered in the next chapter.

(A) **Transfer of Possession without Change of Location.**

The seller can perform his duty of giving possession of the goods without actually handing them over. Any act on his part which puts the buyer in the same position of control which he has been holding himself, will suffice. Accordingly, if the seller offers the goods to the buyer for removal, and the latter requests the former to retain them as bailee, and this is assented to, the seller's duty to give possession is discharged, and he can maintain an action for goods sold and delivered.² But the circumstances must show that the seller's acts were intended to divest his vendor's lien, and to change the nature of his possession from that of unpaid vendor to that of bailee, or of servant of the buyer.³ There is evidence of such inten-

¹ Pollock and Wright on Possession, 46, 47.

² Janvrin v. Maxwell, 23 Wis. 51 (1868).

³ Safford v. McDonough, 120 Mass. 290 (1875); Mitchell v. LeClair, 165 Mass. 308; 43 N. E. 117 (1896).

tion where the goods, being on the seller's premises at the time of sale, are to remain on storage for an agreed sum ;¹ or where, at the buyer's request, the seller delivers with the bill of sale samples of the goods to be used by the purchaser in reselling them ;² or where the buyer, after inspecting the goods, declares that he takes possession of them and arranges with the seller for shipping them as the former "should send word ;"³ or where the buyer, after examining and accepting them, places placards on them stating that he is their owner, and employs persons to guard them.⁴

(a) *Delivery of Goods already in Buyer's Possession.* — It often happens that the subject-matter of a sale is in the buyer's possession when the contract is made. In such a case it is not necessary for the seller to take the property into his actual possession and then return it to the possession of the buyer. If, with the seller's assent, the buyer holds it, after the sale, as owner, a good delivery is established.⁵ And so when one partner or tenant in common sells to another, "the delivery does not so much consist in the actual tradition of the chattels from the one to the other, as in the surrender and relinquishment of the possession by the seller to the purchaser, thereby giving him the absolute and exclusive occupation and control of what before he held in common for himself and others."⁶

In an early English case,⁷ the goods were on the pur-

¹ *Ropes v. Law*, 11 Allen (93 Mass.), 591, 600 (1866).

² *Ingalls v. Herrick*, 108 Mass. 351 (1871).

³ *Parry v. Libbey*, 166 Mass. 112 ; 44 N. E. 124 (1896).

⁴ *Williams & Co. v. Brinton & Co.*, 174 Pa. St. 299 ; 34 At. 442 (1896).

⁵ *Snider v. Thrall*, 56 Wis. 674, 677 ; 14 N. W. 814 (1883).

⁶ *Shurtleff v. Willard*, 19 Pick. (36 Mass.) 202, 210 (1837).

⁷ *Manton v. Moore*, 7 D. & E. 67, 72 (1796). The arbitrator seems to have rested his decision in part on the symbolical delivery of the half-penny ; but this circumstance is not alluded to in the judges' opinions.

chaser's premises at the time of sale, having been brought there by the seller to be used by him in constructing bridges and locks thereon. The only delivery consisted in the execution and transfer of a bill of sale of these and other goods, and the delivery of one copper half-penny as a symbol or representative of the property. It was held that the transaction amounted to a change of possession. "It would have been absurd," said Ashurst, J., "to have removed the goods from the place where they were lying, since they must have been afterwards brought back to the very same spot in order to be used."

(b) *Actual Tradition impracticable*. — The transfer of possession, without a change in the location of the goods, occurs most frequently in the case of ponderous articles, or of property so situated that its actual tradition is impracticable. Upon the sale of a quantity of logs in a boom, if the seller shows them to the buyer and the latter accepts them as his property, the possession is changed. Such acts are as effectual "for such kind of property as a delivery over in hand of a chattel capable of such personal possession."¹

(c) *Symbolical Delivery*. — A delivery of this sort is often spoken of as symbolical;² and in some cases the parties have stipulated that a part of the goods should be delivered as a symbol of the whole;³ but the transaction is quite unlike the transfer of a bill of lading of goods in transit, or of the grand bill of sale of a ship at sea. Here we have examples of true symbolical delivery. "A cargo while in the hands of the carrier is necessarily incapable of physical delivery. During the period of transit and voy-

¹ *Jewett v. Warren*, 12 Mass. 300, 302 (1815).

² *Leonard v. Davis*, 1 Black (U. S.), 482 (1861).

³ *Boynton v. Veazie*, 24 Me. 286 (1844). A delivery of one raft of boards, having the same mark as that on all the lumber and logs sold, was made for the whole property thus marked.

age the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo.”¹ “If a ship is sold whilst at sea, the delivery of the grand bill of sale amounts to a delivery of the ship itself. It is the only delivery which the subject-matter is capable of. The bill of sale is the only muniment of the property; by the vendee’s taking that, he prevents the vendor from defrauding others.”² But in the case of ponderous goods, or of timber afloat in ponds and streams, or so situated as to render actual tradition difficult merely,³ the parties do not deal with a symbol of the chattels; their acts relate to the chattels themselves; and the sole question is, has the seller, “by an apt and manifest act,” put the buyer in the same position of control over them which he has been occupying.⁴

(d) *Delivery by Tradition of Key.* — Such is the nature of the act, when the key of a building in which the goods are located is delivered by the seller to the buyer, for the purpose of passing “the full control of the place to which admission is to be gained by means of the key.”⁵ A delivery of this kind is real, not symbolical, although the latter term has been applied to it frequently.⁶ More than a century ago, Lord Hardwicke said, “delivery of the key of bulky goods, where wines, &c., are, has been allowed as delivery of the possession, because it is the way

¹ *Sanders v. Maclean*, 11 Q. B. D. 327, 341 (1883).

² *Atkinson v. Maling*, 2 D. & E. 462, 465, 466 (1788). A ship may be sold, and title to it pass, while it is at sea, without a transfer of the grand bill of sale; but this will not operate to change the possession. *Scranton v. Coe*, 40 Conn. 159 (1873).

³ *Kingsley v. White*, 57 Vt. 565 (1885).

⁴ *Ludwig v. Fuller*, 17 Me. 162, 166 (1840).

⁵ *Hilton v. Tucker*, 39 Ch. D. 669, 676 (1888).

⁶ *Kellogg Co. v. Peterson*, 162 Ill. 158, 160; 44 N. E. 411 (1896), and the case in the last note.

of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do.”¹ The same doctrine was more concisely stated in an early New York case: “The goods in the storehouses were actually delivered at the time, by the delivery of the keys of the stores.”² In a recent English treatise,³ after an analysis of the English cases, the conclusion is reached that “the key is not a symbol in the sense of representing the goods, but the delivery of the key gives the transferee a power over the goods which he had not before, and at the same time is an emphatic declaration (which, being by manual act, instead of word, may be called symbolic) that the transferor intends no longer to meddle with the goods.” In Scotland the giving up of the key of a repository of goods is deemed an act of real delivery. “It differs from symbolical delivery in this, that a symbol is nothing more than the sign of the thing transferred; whereas the delivery of the key gives to the buyer access to the actual possession of the subject and power over it while the seller is excluded.”⁴

(e) *Delivery by Attornment of Third Party.* — If the property is in the possession of a third party at the time of sale, and a transfer of its possession without a change in its location is desired, it becomes necessary for such third party to attorn to the buyer; that is, to “acknowledge to the buyer that he holds the goods on his behalf.”⁵ “A custodian cannot become the servant of another in respect of his custody except by his own agreement. And *a fortiori*, when that custodian does not yield, but main-

¹ Ward v. Turner, 2 Ves. Sr. 431, 443 (1751).

² Wilkes v. Ferris, 5 Johns. 335, 344 (1810); cf. Carter v. Willard, 19 Pick. (36 Mass.) at p. 8 (1837).

³ Pollock and Wright on Possession, 61-68.

⁴ 1 Bell's Com. (McLaren's ed.) 186.

⁵ Sale of Goods Act, § 29 (3), and cases *infra*.

tains his own possession, it is clear that his custody cannot enure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights.”¹

This consent may be given in advance, as where the third party assures the buyer before the purchase that if the latter buys the goods they shall be subject to his call ;² or where he issues a bill of lading, or other negotiable document of title.³

In England and in most American jurisdictions the common law is understood to “draw a hard and fast distinction between bills of lading and other documents of title. The lawful transfer of a bill of lading was always held to operate as a delivery of the goods themselves. . . . But the transfer of a delivery order or dock warrant operated only as a token of authority to take possession, and not as a transfer of possession.”⁴

Some courts have held, however, that no such distinction existed at common law, but that the delivery of a warehouse receipt gave the deliverer all the rights possessed

¹ *Hallgarten v. Oldham*, 135 Mass. 1, 10 (1883). If the third person is a mere servant of the seller, his possession is the seller's possession, and attornment is not necessary. *Pollock and Wright on Possession*, 60 ; *Hardy v. Potter*, 10 Gray, 89 (1857).

² *Wood v. Manley*, 11 Ad. & E. 34 (1839).

³ *Whitlock v. Hay*, 58 N. Y. 484, 488 (1874). “When a purchaser who has a contract for the sale and delivery to him of a specified quantity of grain or other property, . . . accepts, instead of a delivery of the property, a guaranteed receipt of a warehouseman, made negotiable by the Act of 1858, the presumption is that he accepts such receipt as a performance and satisfaction of the contract by the vendor.” It was accordingly held that the buyer had a right of action against the warehouseman for any deficiency in quantity, but none against the seller.

⁴ *Chalmers' Sale of Goods Act* (2d ed.), 61. The author adds, “As between immediate parties, there is nothing to modify the common-law rule.”

by an assignee of a bill of lading.¹ Such appears to have been the view entertained by English merchants, and by a few judges in that country; but one which was finally overruled² in *Farina v. Home*.³

(*f*) *Does Notice to Third Party dispense with Attornment?* — There is some authority for the statement that attornment by the third party is not essential to a complete delivery by the seller; that notice to him of the sale is sufficient to constitute delivery.⁴ In most of the cases cited for this doctrine, however, there was ample evidence of the third party's consent to hold the property as bailee of the buyer;⁵ and the doctrine itself seems to have originated in jurisdictions where it is held that actual transfer of possession is necessary to the transfer of title as against creditors of the seller or his subsequent vendees.⁶ Moreover, none of the cases cited decide or discuss the question whether a seller performs his duty of giving possession of the thing sold by notifying the third-party possessor of the

¹ *Hood v. Barker*, 8 Cal. 609 (1857); *Davis v. Russell*, 52 Cal. 611 (1878); *Gibson v. Stevens*, 8 How. (U. S.) 384 (1850). In *Hallgarten v. Oldham*, *supra*, Holmes, J., declares that "the simplest explanation of *Gibson v. Stevens* would be that delivery was not necessary by the law of Indiana," and that the true question in that case "was only whether title had passed." But this explanation will not dispose of *McNeil v. Hill*, 1 Woolworth (U. S. Cir. Ct.), 96 (1865), nor of *Harris v. Bradley*, 2 Dillon (U. S. Cir. Ct.), 284, 287 (1872), nor of *First Nat. Bk. v. Bates*, 1 Fed. 702, 710 (1880); *cf.* *Allen v. Maury*, 66 Ala. 10, 18 (1880), and *Yennie v. McNamee*, 45 N. Y. 614, 620, 621 (1871).

² Benjamin on Sales (Bennett's ed., 1892), 796.

³ 16 M. & W. 119 (1846).

⁴ Benjamin's Principles of Sales, 133, 134, and cases.

⁵ *Freiberg v. Steenbock*, 54 Minn. 514; 56 N. W. 175 (1893), is a fair sample; the bailees expressly agreed in advance to surrender to the buyer.

⁶ *Pierce v. Chipman*, 8 Vt. 334, 339 (1836); *Hodges v. Hurd*, 47 Ill. 363 (1868).

sale.¹ The dicta in Massachusetts cases upon this subject have been robbed of all authority by the decision in *Hallgarten v. Oldham*, *supra*.

(B) **Transfer of Possession by Delivery to a Carrier.**

We have seen that the place of giving possession, in the absence of an agreement upon this point, is the seller's place of business or abode, or the place where the goods are at the time of sale; and that the seller is not bound to despatch the goods. But he may, and often does, agree to send them to the buyer. In such a case, his duty of giving possession is performed when he has delivered the goods to a suitable carrier, in proper condition for transportation, correctly addressed, and has exercised due care and diligence in providing the buyer with a remedy against the carrier.²

(a) *Implied Authority to deliver to a Carrier.* — As early as 1803, Lord Alvanley declared it "to be a proposition as well settled as any in the law that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser."³ Delivery to the carrier does not have this effect, however, unless it is made with the buyer's assent,⁴ although that "may be implied from the course of trade."⁵ If the buyer designates a particular carrier, the seller has

¹ Before the Sale of Goods Act, "the law of Scotland seems to have been satisfied with intimation to the custodier, without acknowledgment by him." *Brown's Sale of Goods Act* (Edinburgh, 1893), 139, and *Black v. Incorporation of Brokers*, 6 Sess. Cas. 3d series, 141, 144 (1867).

² *Kelsea v. Ramsey Co.*, 55 N. J. L. 320; 26 At. 907 (1893).

³ *Dutton v. Solomonson*, 3 B. & P. 582, 584; cf. *Comstock v. Affouter*, 50 Mo. 411 (1872).

⁴ *Loyd v. Wight*, 20 Ga. 574 (1856).

⁵ *Hague v. Porter*, 3 Hill (N. Y.), 141, 144 (1842).

no authority to send by any other. If he does despatch the goods by another, such carrier is his agent, and not the buyer's, "and he cannot be allowed to assert that he has made a complete delivery."¹

(b) *Goods must be prepared for Transportation.* — The seller's agreement to despatch the goods undoubtedly binds him to exercise reasonable care in preparing them for transportation. "If a vendor is to ship a set of dishes to his vendee, it requires no argument to establish that his duty would not be performed by putting them in a box without any packing to prevent breakage, and then deliver them to a carrier." Nor does the seller of fruit make a good delivery of it to the buyer, by shipping it in a box car unprotected during freezing weather, when it might have been made perfectly safe by proper packing and the use of a refrigerator car.²

(c) *Goods must be correctly Addressed.* — In order that delivery to the carrier may operate as delivery to the buyer, the goods must be correctly addressed by the seller. If he gives insufficient³ or inaccurate directions to the carrier, and in consequence thereof⁴ the goods do not reach the buyer, the seller cannot recover for goods sold and delivered, and if the buyer has paid for them, he can recover the price.

(d) *Care in providing the Buyer a Remedy against the Carrier.* — The degree of care and diligence required

¹ *Wheelhouse v. Parr*, 141 Mass. 593, 596; 6 N. E. 787 (1886); cf. *Iasigi v. Rosenstein*, 141 N. Y. 414; 36 N. E. 509 (1894), where the steamer of shipment was named, but that of arrival was not, and evidence of usage of transshipment at Liverpool was held admissible; reversing same case in 65 Hun, 591. To the same effect is *Harrison v. Fortlage*, 161 U. S. 57, 64; 16 Sup. Ct. 488 (1895).

² *Wilson v. Western Fruit Co.*, 11 Ind. App. 89, 93; 38 N. E. 827 (1894).

³ *Finn v. Clark*, 10 Allen (92 Mass.) 479 (1865).

⁴ *Garretson v. Selby*, 37 Ia. 529 (1873).

of the seller in providing the buyer with a remedy against the carrier is well illustrated by a leading English case¹ which has been cited by our courts frequently. By a well-known rule of the carrier, its liability for packages was limited to £5, unless they were entered and paid for as of greater value. Yet the seller shipped goods worth £51 without making special entry of them. They were lost, and the seller, suing for goods sold and delivered, was defeated. "The plaintiff," said Ellenborough, C. J., "cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carriers' general undertaking required, with respect to goods of this value, to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers."

(e) *Should the Seller afford the Buyer an Opportunity to insure?*—The English statute, adopting a rule of the Scotch law, imposes upon the seller, in the absence of an agreement to the contrary, the duty of giving the buyer such notice as may enable him to insure the goods during their sea transit.² No such duty is imposed by English common law. "In the absence of a special contract, the seller of goods is not bound to insure, nor to impart any

¹ Clarke v. Hutchins, 14 East, 475 (1811).

² Brown, Sale of Goods Act (§ 32 (3)), 156-164. The author, after reviewing the Scottish authorities, on which this sub-section is founded, and noting that under them "the seller's duty was fulfilled if he posted, on the day of the shipment, a notice to the buyer containing the necessary particulars for insurance," adds that the statute seems to impose a heavier duty, and may require "a resort to telegraphic communication."

information upon the subject of insurance.”¹ Whether the seller is under a contract duty to insure or to give such notice of shipment as will enable the buyer to insure, may depend upon the course of dealing between them.²

(f) *Delivery to a Warehouseman.* — “The delivery of goods by the seller to a warehouseman, pursuant to authority from the buyer, is a delivery to the buyer.”³

(c) **Change of Location without Transfer of Possession.**

The location of goods may be changed, pursuant to the provisions of a sale contract, while the possession remains in the seller. Accordingly, delivery to a carrier does not transfer possession to the buyer, if the vendor is bound to transport the goods to the vendee. In such a case the carrier holds the property as agent of the vendor, whose obligation to give possession is not performed until that agent makes delivery to the vendee. For delay on the part of the carrier,⁴ or negligence in dealing with the goods,⁵ or failure to deliver for any cause not due to the fault of the purchaser,⁶ the seller is responsible.

Nor is the possession of goods transferred to the buyer, although they are placed on his premises by the seller, if their delivery is made subject to some condition to be ful-

¹ *Bartlett v. Jewett*, 98 Ind. 206 (1884).

² *N. Y. Tartar Co. v. French*, 154 Pa. St. 273; 26 At. 425 (1893).

³ *Hunter v. Wright*, 12 Allen (94 Mass.), 548 (1866).

⁴ *Braddock Glass Co. v. Irwin*, 153 Pa. St. 440, 443; 25 At. 490 (1893).

⁵ *McNeal v. Braum*, 53 N. J. L. 617, 627; 23 At. 687 (1891).

⁶ *McLaughlin v. Marstin*, 78 Wis. 670; 47 N. W. 1058 (1891). In this case a quantity of coffee, which plaintiff had agreed to sell and deliver to the defendant at La Crosse, Wis., was attached by a creditor of defendant while in the hands of a carrier in Chicago, to whom plaintiff had delivered it for transportation to La Crosse. The court held that such attachment was no excuse for the non-delivery of the coffee at La Crosse.

filled by the former before he is to exercise control over them.¹

(D) **A Partial Delivery under an Entire Contract.**

This does not satisfy the seller's obligation to give possession,² unless the purchaser waives full performance,³ or the delivery of a part is made and accepted in token of a delivery of the whole.⁴

§ 8. Buyer's Rights against Third Parties.

As a rule, the purchaser of personal property acquires no better title than his vendor had. If he buys goods from a thief, or from a finder, or from any other person having no authority to sell, although his purchase is made in entire good faith and for full value, he obtains no right to them as against the true owner. This rule is subject to some exceptions and qualifications, which are now to be considered.

1. *Sale in Market Overt.* — In England, "where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller."⁵ This exception was not recognized prior to Edward I.,⁶

¹ *Bishop v. Shillito*, 2 B. & Ald. 329 n (a) (1819); *Smith v. Lynes*, 5 N. Y. 41 (1851); *Woodbury v. Long*, 8 Pick. 542 (1829); *Seed v. Lord*, 66 Me. 580 (1876).

² *Kuhlman v. Wood*, 81 Ia. 128; 46 N. W. 738 (1890).

³ *Brady v. Cassidy*, 145 N. Y. 171, 180; 39 N. E. 814 (1895). A very interesting and instructive case.

⁴ *Hobbs v. Carr*, 127 Mass. 532 (1879).

⁵ *Sale of Goods Act*, § 22 (1). The cases, in which title may be revested in true owner, are specified in § 24, the second paragraph of which overrides *Bentley v. Vilmont*, 12 App. Cas. 471 (1887).

⁶ *History of English Law* (Pollock and Maitland), vol. ii. p. 163: "They enable us to lay down a proposition about the substantive law of the thirteenth century, which, regard being had to what will be said

and is now applicable only "to a limited class of retail transactions."¹ It has never "been recognized in any of the United States, or received any judicial sanction."² In an early Pennsylvania case,³ the court declared: "This efficacy of markets overt arose from prescription, and was part of the ancient common law. But in this government, we have no such ancient law or custom. On the contrary, the uniform determinations of courts of justice have rejected such an usage whenever it has been relied on, and great ineonveniences would arise from adopting it."

2. *Negotiable Paper*.—Negotiable paper affords another exception to the general rule governing the transfer of title to personal property. When payable to bearer or indorsed in blank, so as to be transferable by delivery, the transferee acquires a perfect title if he purchases it before due and in good faith.⁴ The exception in the case of such negotiable securities has been "so framed to give confidence and security to those who receive them for a

in later days, is of no small value. Stolen goods can be recovered by legal action, not only from the hands of the thief, but from the hands of the third, the fourth, the twentieth possessor, even though those hands are clean and there has been a purchase in open market." Cf. *Peer v. Humphrey*, 2 A. & E. 495, 499 (1835), where Williams, J., declares this exception to be as old as the law itself. In *Crane v. London Dock Co.*, 5 B. & S. 313, 318 (1864), and in *Bryant v. Whitcher*, 52 N. H. 158 (1872), will be found learned suggestions as to the origin of this doctrine.

¹ Chalmers' Sale of Goods Act (2d ed.), 51.

² *Ventress v. Smith*, 10 Pet. (U. S.) 161, 176 (1836). The oldest reported decision to this effect is *Towne v. Collins*, 14 Mass. (Supplement) 500 (1785).

³ *Hosack v. Weaver*, 1 Yeates (Pa.), 478 (1795).

⁴ *Miller v. Race*, 1 Burr. 452, 459 (1758): "No dispute ought to be made with the bearer of a cash-note in regard to commerce, and for the sake of the credit of these notes." In *Peacock v. Rhodes*, 1 Doug. 633, 636 (1781), it is said: "If this rule" (the general rule as to sale of goods) "were applied to bills, it would stop their currency."

valuable consideration in the ordinary course of business, . . . and in general a party taking such a security under such circumstances has only to look to the credit of the parties to it, and the regularity and genuineness of the signatures and indorsements.”¹

3. *Transfer by One not Owner, under a Power of Sale.* — In some cases, a person in possession of goods, although not their general owner, can transfer a perfect title by reason of a common law or statutory power. This may be done by an officer pursuant to legal process, “unless the writ be void, or the goods taken were the property of a stranger.”² It may be done, also, by a pledgee,³ or by a master of a vessel in some circumstances.⁴

4. *Transfers with Consent of Owner.* — All other exceptions and qualifications to which the general rule is subject are grounded in the express or implied consent to the sale of the true owner. In a leading New York case⁵ on this subject, it is said: “After a careful examination of all the English cases and those of this State, that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration, in the course of trade, without

¹ *Wheeler v. Guild*, 20 Pick. 545, 550 (1838); *Spooner v. Holmes*, 102 Mass. 503 (1869).

² *Kennedy v. Dunklee*, 1 Gray (67 Mass.), 65, 67 (1854). If the goods sold by the officer are exempt from execution, a purchaser with notice of the claim of exemption gets no title. *Johnson v. Babcock*, 8 Allen (90 Mass.), 583 (1864). An attachment creditor has no power to sell the attached property, and cannot give title thereto even to a *bona fide* purchaser. *Jetton v. Tobey*, 34 S. W. 531; 62 Ark. 84 (1896).

³ *Guinzburg v. Downs*, 165 Mass. 467; 43 N. E. 195 (1896).

⁴ *Butler v. Murray*, 30 N. Y. 88 (1864).

⁵ *Saltus v. Everett*, 20 Wend. 266, 279 (1838). Cf. Sale of Goods Act, § 21.

notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and those cases only, where such owner has by his own direct voluntary act conferred upon the person from whom the *bona fide* vendee derives title the apparent right of property as owner, or of disposal as an agent."

(a) *Sale by Buyer with Voidable Title.*—The apparent right of property as owner is conferred upon a purchaser who has acquired a voidable title from the seller. The vendee from such a purchaser gets a perfect title, if he buys in good faith and without notice of his vendor's defect of title. When the owner of goods delivers them to a purchaser under a *de facto* contract of sale, he does this with the intention of conferring complete dominion over them upon the purchaser. If that intention has been induced by fraudulent representations, the seller has the option of rescinding the contract and retaking the goods, if they are still under the purchaser's dominion; or of enforcing the contract. In case they are sold to a *bona fide* new purchaser, before the seller's option is exercised, the question arises upon which of two innocent parties the consequences of the first purchaser's fraud must fall; and the courts have had little hesitation in answering that it must fall upon the original vendor. It is to his act—generally an act to which something of "negligence, or carelessness, or inadvertence"¹ on his part attaches—that the loss

¹ *Kingsbury v. Smith*, 13 N. H. 109, 120 (1842); *White v. Gordon*, 10 C. B. 919, 926 (1851). "The question is one of considerable importance, as affecting the mercantile transactions of this country; for if the argument urged on the part of the defendants were well founded, goods at all tainted by fraud might be followed through any number of *bona fide* purchasers,—a most inconvenient, and, as it strikes me, a most absurd doctrine. A vendor who does not choose to avail himself of means of inquiry, would thus, by trusting the vendee, be giving him unlimited means of defrauding the rest of the world." Jervis, C. J., at p. 927.

is due. He has clothed the first buyer with title and possession, thus enabling him to transfer title and possession to another.

(b) *Sale by One Who obtained Possession by Trick.* — Such is not the case, however, where goods are obtained by some trick or device from the owner, who has not contracted nor intended to transfer his title to the goods to the trickster. Here, no sale is made to the trickster, nor does he obtain even a defeasible title. If A in the name of B orders goods from C, who supplies them under the mistaken idea that he is contracting with and passing title to B, no title is acquired by A, and he can transmit none even to a *bona fide* purchaser.¹ Nor does X obtain any title to goods, nor apparent authority from Y to sell them, when he gains possession by false representation that he is buying as agent for a particular firm,² or for an undisclosed principal in good credit with Y.³ In the case last cited, it is said: “The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent and has no reasonable expectation of paying for them; or being identified by the senses and dealt with as the person so identified,

¹ Cundy v. Lindsay, 3 App. Cas. 459 (1878).

² Barker v. Dinsmore, 72 Pa. St. 427 (1872).

³ Radliff v. Dallinger, 141 Mass. 1, 6; 4 N. E. 805 (1886). If A buys and receives goods from B, he can give good title to C, although B supposed that A was buying for D, A making no false representations and B in no way disclosing his mistaken notion to A. Stoddard v. Ham, 129 Mass. 383.

says that he is A when in fact he is B.¹ But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake."

(c) *The Second Purchaser must buy in Good Faith and part with Value.*—In order that the second purchaser may hold the goods as against the defrauded vendor, he must be an innocent purchaser for value. If he buys them with notice of his vendor's defective title, or "with knowledge of circumstances to put him to an inquiry as to the source of that title,"² his own title is no better than his vendor's. Again, though he acquires the chattels in good faith, his title will be defective unless he pays a valuable consideration for them. In the case last cited, Allen, J., said: "There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner." In a later case, the same court held that if the purchaser paid value for goods which were represented to be and were in his vendor's possession, the payment was made upon the credit of that possession, and he could hold the goods.³

(d) *Meaning of Valuable Consideration.*—What constitutes a valuable consideration in this class of cases is a question upon which the courts are at variance.

¹ *Edmunds v. Merch. T. Co.*, 135 Mass. 283 (1883); *cf.* Lord Hatherley's opinion in *Cundy v. Lindsay*, *supra*, 468, 469.

² *Barnard v. Campbell*, 58 N. Y. 73, 76 (1874).

³ *Parker v. Baxter*, 86 N. Y. 586 (1881).

A Creditor receiving Goods in Payment of a Debt is not a Purchaser for Value. — According to one class of decisions, “a valuable consideration means the parting with some value that cannot be actually restored by operation of law, leaving the purchaser in a changed condition, so that he may lose something beside his bargain,” if compelled to surrender the goods to the defrauded vendor.¹ Where this doctrine prevails, one who takes property in payment of a pre-existing debt² or even in “satisfaction and discharge of such debt,”³ is not a purchaser for a valuable consideration. In such cases it is said, “the purchaser will be restored to what he may have yielded up, if the original owner, who has been defrauded, reclaims and recovers the property. The consideration having failed, it will be the right of the purchaser to be placed in *statu quo*, and the courts, in the exercise of their remedial power, will be adequate to furnish him the needed relief, even though, as in the present case, there may have been a surrender of a promissory note. The purchaser will not, therefore, be materially affected in his legal rights by the retaking of the goods by the original owner.”⁴ It is also said that

¹ *Hurd v. Bickford*, 85 Me. 217, 220 ; 27 At. 107 (1892).

² *Mayer v. Heidelberg*, 123 N. Y. 332, 339 ; 25 N. E. 416 (1890). The New York cases treat the transferee of negotiable paper, who takes it in extinguishment of an old debt, as a holder for value ; but in *Button v. Rathbone*, 137 N. Y. 187, 192 (1891), the goods having been credited on an old debt, it was thought “unnecessary to inquire whether the principle so frequently applied to transactions with banks in regard to negotiable paper has any application to transfers of personal property.”

³ *Schloss v. Feltus*, 103 Mich. 525 ; 61 N. W. 797 (1895), rejecting the New York distinction, *supra*.

⁴ *Eaton v. Davidson*, 46 Ohio St. 355, 369 ; 21 N. E. 442 (1889). On p. 362 it is said the purchaser “must buy for an adequate, valuable consideration.” In Ohio, one who takes negotiable paper in

taking goods in payment of a precedent is not a purchase in the usual course of trade.¹

The Opposite View. — According to another class of decisions, one who takes property in payment of a precedent debt is a purchaser for a valuable consideration. Bowen, L. J., did not hesitate to declare² that such was always the common-law rule “before the reign of Queen Elizabeth as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country. . . . The man who has a debt due him, when he is paid the debt has converted the right to be paid into actual possession of the money; he cannot have both the right to be paid and the possession of the money. In taking payment, he relinquishes the right for the fruition of the right. In such a case, the transaction is completed; and to invalidate that transaction would be to lull creditors into a false security, and to unsettle business.”³

payment of an antecedent debt, is deemed a purchaser for value, because of the policy of the law to facilitate the circulation of such paper. *Id.* pp. 365, 366.

¹ *Root v. French*, 13 Wend. (N. Y.) 570 (1835). In New Jersey, one who takes property in payment of a pre-existing debt is a purchaser in good faith, *Knowles v. Vacher*, 57 N. J. L. 490 (1895); but not for a valuable consideration, *DeWitt v. Van Sickie*, 29 N. J. E. 209, (1878).

² *Taylor v. Blakelock*, 32 Ch. D. 560, 570 (1886).

³ In *Butters v. Haughwout*, 42 Ill. 18, 32 (1866), the court said: “A creditor who takes goods in payment, in whole or in part, of a precedent debt, in good faith, . . . is lulled into security. He rests in the belief that his debt is paid, and foregoes all effort to seek other payment or security. . . . It is a matter of uncertainty that a party so receiving goods in payment of a precedent debt, is in no worse condition if they are taken from him than he was before he received them. If he loses a security he might have obtained, . . . or if his vendor becomes insolvent, . . . he is in a worse condition.” *Schufeldt v. Pease*, 16 Wis. 659 (1863), *accord*.

Is a Pledgee a Purchaser for Value? — The courts also disagree upon the question whether a creditor who takes property, not in payment of an existing debt, but as collateral security for it, can hold it as against the defrauded vendor. In England, and in a few of our States,¹ he is deemed a holder of the property for a valuable consideration, to the extent of his demand. It is said that such security induces the creditor “to give time and forbearance or some other advantage” to the debtor, “and that is a valuable consideration,”² or it imposes upon the creditor “burdens or duties not resting on him before, the failing to bear or perform which will result in loss or in diminution of his debt,” and such “indefinite detriment clearly makes him a holder for value.”³ The prevailing view in this country is, however, that a pledge of chattels as security for a pre-existing debt, when there is no contract for the extension of time or other advantage to the debtor, “does not constitute the pledgee a holder for value within the meaning of the rule we are considering.”⁴

(e) *An Attaching Creditor or Assignee as a Purchaser for Value.* — In most jurisdictions an attaching creditor⁵ or an assignee⁶ in insolvency or bankruptcy is deemed not a purchaser for value of the chattels attached or assigned.

¹ *Frey v. Clifford*, 44 Cal. 335 (1872); *Brem v. Lockhart*, 93 N. C. 191 (1885).

² *In re Barker's Estate*, 44 L. J. Ch. 487, 490 (1875); cf. 2 Bigelow on Fraud, 460.

³ Bigelow on Bills and Notes, 217, 218.

⁴ *Goodwin v. Mass. Loan Co.*, 152 Mass. 189, 199; 25 N. E. 100 (1890); *Harris v. Lombard*, 60 Miss. 29, 33 (1882). Although a creditor receiving property of his debtor as collateral security is entitled to hold it as against other creditors. *Surget v. Boyd*, 57 Miss. 485, 489 (1879).

⁵ *Oswego Starch Factory v. Lendrum*, 57 Ia. 573 (1881), and cases in preceding note. *Contra*, *Van Duzon v. Allen*, 90 Ill. 499 (1878).

⁶ *Beneset v. Weil*, 69 Md. 276; 14 At. 666 (1888). *Contra*, *Oberdorfer v. Meyer*, 88 Va. 384; 13 S. E. 756 (1891).

(f) *A Second Purchaser who has promised to Pay.*—It is to be borne in mind that the buyer of goods is not entitled to the rights of an innocent purchaser for value simply because he has bound himself to pay for them.¹ He must have paid for them, or parted with a valuable consideration, before receiving notice of his vendor's defective title, or he cannot hold them against the defrauded vendor. Accordingly, if A sells and delivers to B personal property in consideration of B's promise to satisfy a debt and surrender securities, and before such satisfaction and surrender B receives notice of A's defective title, B can acquire no greater rights in the property than A had.² If the second purchaser has given notes or other engagements to pay for the goods, and has disposed of the property to *bona fide* purchasers, the defrauded vendor may, by appropriate proceedings, obtain such notes or engagements.³

(g) *Legal Holder of Bill of Lading has Apparent Authority to sell.*—The apparent right of property as owner is conferred, also, upon the legal holder of a bill of lading. Such an instrument is not only a symbol of the goods therein described, so that its delivery while the goods are in transit⁴ is the legal equivalent of the transfer of possession of the goods themselves, but it is an "effect-

¹ *Lyttle v. Lansing*, 147 U. S. 59 ; 13 Sup. Ct. 254 (1892).

² *Hayden v. Charter Oak D. P.*, 63 Conn. 142 ; 27 At. 232 (1893).

³ *Am. Sugar Co. v. Fancher*, 145 N. Y. 552 ; 40 N. E. 206 (1895).

⁴ In *Barber v. Meyerstein*, L. R. 4 H. L. 317 (1870), at p. 329, it is said: "An indorsement of the bill of lading carries with it the property in the goods when the goods are at sea," and "the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it." Again, at p. 335, "Unquestionably the bill of lading, as long as the engagement to the shipowner has not been fulfilled, is a living current instrument, and no doubt the transfer of it for value passes the absolute property in the goods."

tive representation of the ownership of the goods," and hence "the parting with a bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself."¹ As a symbol of the goods and a muniment of title thereto, a bill of lading was treated by the law merchant as negotiable, to some extent, "for the general convenience of commerce;" and its legal holder might, "by indorsement, transfer a greater right than he himself had."² His indorsement or assignment thereof to a *bona fide* purchaser not only cut off an unpaid vendor's right of stoppage *in transitu*,³ but enabled the transferee to hold the goods against a defrauded vendor.⁴

(h) *Bill of Lading not fully Negotiable*.—But a bill of lading was not treated as negotiable for all purposes. Indeed, the contract for carriage and delivery, which is embodied in a bill of lading, did not pass to the indorsee with the property in the goods, and statutes were required to enable him to enforce the rights in respect of this contract in his own name.⁵ Nor was a bill of lading, even when considered as a document of title, possessed of all

¹ Barber v. Meyerstein, *supra*, 326, 330.

² Jenkyns v. Osborne, 7 M. & G. 678, 699 (1844). In this case the one undertaking to transfer the bill of lading was not in possession of it, and the court held that "the interest in the goods did not pass, as it would have done if the transfer had been by assignment of the bill of lading," and that the transferee obtained only such rights as his transferor had.

³ Lickbarrow v. Mason, 2 D. & E. 63 (1787); Dows v. Greene, 24 N. Y. 638 (1862). This topic will be considered more fully in the next chapter.

⁴ The Argentina, L. R. 1 Adm. 370 (1867); Winslow v. Norton, 29 Me. 419 (1849).

⁵ See Bills of Lading Act (1855), 18 & 19 Vict. c. 111. Under this statute, the *bona fide* transferee of a bill of lading takes it free from all liabilities of his transferor to the shipowner, not stated in the instrument. Laduc v. Ward, 20 Q. B. D. 475 (1888).

the characteristics or governed by all the rules of negotiable paper. If it was obtained by a trick of such nature as that no title to it passed to the consignee, he could not confer upon an innocent purchaser for value a valid title by its indorsement.¹ Nor could the innocent purchaser from a thief² or from a finder of a bill of lading acquire title to it; and if the owner of a bill of lading, made out in two or more parts, transferred one part to a purchaser for value and thus divested himself of title to the goods, he could not by a subsequent transfer of another part confer any property rights in them to a second innocent purchaser for value.³

Again, it was held that "although the shipper may have indorsed in blank a bill of lading deliverable to his assigns his right is not affected by an appropriation of it without his authority. . . . The bill of lading only represents the goods; and in this instance, the transfer of the symbol does not operate more than a transfer of what is represented."⁴ To such an instrument, "the doctrine of *bona fide* purchaser only applied in a limited sense."⁵

(i) *Negotiability of Bills of Lading under Statutes.*—In many jurisdictions, statutes have been enacted, declaring

¹ Dows v. Perrin, 16 N. Y. 325 (1857).

² Brower v. Peabody, 13 N. Y. 121 (1855).

³ Barber v. Meyerstein, L. R. 4 H. L. 317, 331 (1870). "There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents." First Nat. Bank v. Edge, 109 N. Y. 120; 4 Am. St. R. 431; 16 N. E. 317 (1888). But the carrier is justified in a *bona fide* delivery of the goods to the holder first presenting a bill of lading. Glyn Co. v. East Ind. Co., 7 App. Cas. 591 (1882). A purchaser of goods, under a contract providing for payment in exchange for bill of lading, has no right to demand all three parts as a condition of making payment. Sanders v. Maclean, 11 Q. B. D. 327 (1883).

⁴ Gurney v. Behrend, 3 E. & B. 606, 634 (1854).

⁵ Pollard v. Vinton, 105 U. S. 7, 8 (1881).

bills of lading, warehouse receipts, and other documents of title to be negotiable by indorsement and delivery, in the same manner as bills of exchange. Even such legislation, however, has not transformed a document of title to goods into a fully negotiable instrument. Its nature and its functions make such a transformation impracticable,¹ and fully justify the view taken by most courts that these statutes have for their sole objects the regulation of the *manner* of transferring documents of title to goods, and the declaration that the "transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself."² In a leading case in the U. S. Supreme Court, this language is used: "It cannot be that the statute, . . . intended to change totally the character of bills of lading, put them in all respects on the footing of instruments which are representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible; such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief."

Even a statute declaring that any person to whom a negotiable warehouse receipt "is transferred, must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any

¹ *Shaw v. Railroad Co.*, 101 U. S. 557, 565 (1879). In *Tiedeman v. Knox*, 53 Md. 612 (1880), there is a dictum to the effect that the extremely rigid statute of that State makes bills of lading "negotiable in the same sense as bills of exchange;" but see *Seal v. Zell*, 63 Md. 356 (1884).

² *Nat. Bank v. Chic. Bur. & N. R. Ry.*, 44 Minn. 224, 237; 20 Am. St. Rep. 566; 46 N. W. 560 (1890).

pledge, lien, or transfer made or created by such person," has been interpreted as conferring upon the receipt only a quasi-negotiable character. It gives to the transfer of the receipt the same effect as the common law gives to the transfer of the goods represented by the receipt; but it does not modify the "common-law right of the owner of personal property to recover it from one who claims under a disposition of it which was unauthorized by the owner."¹ Any other interpretation of such a statute "would enable any one, fraudulently depositing the goods of another, to pass title as against the true owner by obtaining a warehouse receipt in his own name."²

In accordance with this view of the statutes, it has been held that a warehouseman is not a guarantor of the title of property described in his receipt,³ and that an indorser of a bill of lading does not guaranty the performance of the contract therein contained.⁴ In the case last cited, it is said: "If the instrument is fictitious, or if there is any fraud practised in transferring it, any remedy that the transferee would be entitled to would be for that special wrong; and not by importing into the indorsement a promise to perform what the carrier had agreed or purported to have agreed to do."

(j) *Sale by One in Possession without other Semblance of Authority.* — The apparent right of property as owner is not conferred, at common law, upon the mere possessor of goods, even though he is in possession with the consent of the owner. "The law is clearly laid down that the mere possession of personal property does not convey a title to dispose of it."⁵ If the owner of lumber delivers it

¹ Com. Bank v. Hurt, 29 Ala. 130; 12 So. 568 (1892).

² First Nat. Bank v. Boyce, 78 Ky. 42, 56 (1879).

³ Insurance Co. v. Kiger, 103 U. S. 352 (1880).

⁴ Maybee v. Tregent, 47 Mich. 495, 498; 11 N. W. 287 (1882).

⁵ Pickering v. Busk, 15 East, 38, Le Blanc, J. (1812).

to A, for shipment in the owner's name to B, for sale, and A ships it in his own name and sells it as his own property, the purchaser acquires no rights to the lumber as against the owner.¹ Possession in such a case is given to A as bailee, or as agent for the transportation or custody of the goods, and no color of authority is bestowed upon him to sell them. To permit him to transfer a valid title to them would violate that fundamental principle of the common law, "that a man cannot be divested of his title to property without his consent" or the operation of law ;² and would give to bailees "the dominion over all the goods intrusted to them."³

(k) *Sale by Possessor with Apparent Authority to Sell.* — If, however, the owner delivers goods into the possession of another "whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them," and a *bona fide* purchaser for value from such a possessor can hold the property.⁴ The same result follows where the owner has suffered another to have possession of property and of those documents which are the *indicia* of property ;⁵ as where the owner of a ship in process of construction permitted his agent to take out the usual builder's certificate and to have her enrolled in the agent's name as owner ;⁶ or where the owner of bank-stock delivered to his stock-brokers as collateral security the certificate therefor upon which was indorsed a blank assignment subscribed by him.⁷

¹ Covill v. Hill, 4 Den. (N. Y.) 323 (1847).

² Leigh Bros. v. Mobile Ry., 58 Ala. 165 (1877).

³ Wilkinson v. King, 2 Camp. 335 (1809).

⁴ Pickering v. Busk, *supra*.

⁵ Dows v. Kidder, 84 N. Y. 121 (1881); O'Connor's Admx. v. Clark, 170 Pa. 318 ; 32 At. 1029 (1895).

⁶ Calais Steamboat Co. v. Van Pelt, 2 Black (U. S.), 372 (1862).

⁷ McNeil v. Bank, 46 N. Y. 325 (1871). But the mere custody of

(1) *Sale by Conditional Vendee.*—In accordance with the foregoing principles, the delivery of goods to one who has contracted to purchase them, but is not to acquire title until they are paid for, does not confer upon him apparent authority to sell either as owner or as agent of the owner. His possession is that of a bailee for a specific purpose,¹ not that of a purchaser under a voidable title,² nor that of an agent for sale.³ Having no title, and no real or apparent authority from the owner to sell, he cannot convey to a purchaser any greater rights than he possesses. “Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts.”⁴ The common law imposes upon a purchaser the duty of inquiry concerning the title of his vendor;⁵ and if he fails to make inquiry, or if his vendor deceives him in respect of such title, any loss which ensues, in cases such as we are now considering, is ascrib-

corporate stock by an agent does not confer upon him the apparent ownership of the stock, nor apparent authority to transfer it; and a purchaser from him cannot hold it as against the true owner. *Knox v. Eden Musee*, 148 N. Y. 441; 42 N. E. 988 (1896).

¹ *Coggill v. Hartford Ry.*, 3 Gray (69 Mass.), 545 (1854).

² *Cole v. Berry*, 42 N. J. L. 308, 314 (1880).

³ *Leigh Bros. v. Mobile Ry.*, 58 Ala. 165, 180. But the owner may clothe his conditional vendee with apparent authority to sell as the owner's agent. See *Rogers v. Whitehouse*, 71 Me. 222, 226 (1880); *Vallentine v. Reid*, 22 Sess. Cas. 4th series, 711 (1895); *Columbus Buggy Co. v. Turley*, 19 So. 232; 73 Miss. 529 (1896).

⁴ *Coggill v. Hartford Ry.*, *supra*.

⁵ *New Haven Wire Co. Cases*, 57 Conn. 352, 386; 18 At. 266 (1889). “The law does not, as an universal rule, protect a man in the assumption that he who asks for credit is the owner of every article of personal property of which he has possession; it imposes upon the intending creditor the obligation to inquire into the character of that possession; and inasmuch as the inquiry is a necessity, it does not concern the public that the conditions are many; the answer will reveal all.”

able to his own fault or to his confidence in his vendor, and not to any conduct of the true owner having a legal tendency to mislead and victimize him.¹ In the last-cited case, it is said: "The possession of the contemplated purchaser gives him no better opportunity to impose upon purchasers than that of an ordinary bailee. Possession by a vendor without title has never been held sufficient to confer title upon a purchaser from him. Clearly, the existence of an executory contract by which a vendor not in possession may acquire title upon the performance of some act by him, will not enable him to confer a title upon a purchaser from him. If neither of these facts separately considered will enable a vendor to confer title, I am unable to see how such result can be produced by uniting them in a vendor."

What Right may be acquired by a Purchaser from a Conditional Vendee. — A purchaser from a conditional vendee, before default by the latter, may undoubtedly acquire all of his vendor's rights under the contract, and if the conditions are duly performed or tendered by his vendor or by himself, he may obtain a perfect title to the goods.² But if they are not fully performed or waived, he cannot hold the goods, nor, in most jurisdictions, does he acquire any interest in them, either legal or equitable, by reason of partial performance by his vendor or by himself.³ Some courts, however, hold that "the reservation

¹ *Ballard v. Burgett*, 40 N. Y. 314, 316 (1869). The foregoing case is distinguished, in *Comer v. Cunningham*, 77 N. Y. 391 (1879), from prior decisions, which were viewed as establishing "that a condition that the title shall not pass until payment, when attached to a delivery upon an actual completed contract of sale, is available only as against the vendee and persons claiming under him, other than *bona fide* purchasers."

² *Day v. Bassett*, 102 Mass. 445 (1869).

³ *Hawkins v. Hersey*, 86 Me. 394, 399; 30 At. 14 (1894); *Empire State F. Co. v. Grant*, 114 N. Y. 40; 21 N. E. 49 (1889).

of the title is but as security for the purchase-price, and if the property is recovered by the seller, he must deal with it as security and with reference to the equitable rights of the purchaser."¹ The cases upon this branch of the subject frequently turn upon the construction of particular agreements² and a discussion of the legal principles which they involve belongs to a treatise on the general subject of contract, rather than to a hand-book on sales.

(*m*) *Statutory Reputed Ownership*. — The common-law doctrine that the possession of goods does not confer apparent ownership³ has been modified by legislation which has established the doctrine of "statutory reputed ownership." It was introduced by a provision of the English bankruptcy statute of 1623,⁴ to the effect "that if any person shall become bankrupt, and at such time as they shall so become bankrupt, shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition any goods or chattels whereof they shall be the reputed owners, and take upon them the sale, alteration, or disposition as owners," in every such case the commissioners in bankruptcy shall have power to sell the same for the benefit of the bankrupt's creditors. Under this statute the owner of goods, who has delivered possession to another pursuant to a contract commonly known as one of conditional sale, is pre-

¹ *Foundry Co. v. Pascagoula Co.*, 72 Miss. 608, 615; 18 So. 364 (1895).

² *Brewer v. Ford*, 54 Hun, 116; 59 *Id.* 17; 126 N. Y. 643 (1891); *Tufts v. Griffin*, 107 N. C. 47 (1891).

³ *Lickbarrow v. Mason*, 1 H. Bl. 357, 360 (1790). "Possession of goods is *prima facie* evidence of title, but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier, or factor. Mere possession without a just title gives no property."

⁴ 21 Jas. I. ch. 19, §§ 10 & 11; continued in 46 & 47 Vict. ch. 52, § 44.

cluded from asserting his title as against an assignee in bankruptcy,¹ unless the circumstances of the case, including trade usages applicable to the transaction,² rebut the presumption of reputed ownership in the bankrupt. This statutory provision, it will be observed, modified the common-law rights of a conditional vendor as against an assignee in bankruptcy only; it did not apply to the vendee's purchasers nor to his execution or attachment creditors.

(n) *Reputed Ownership misapplied.* — A few American courts, failing to note the narrow limitations of the statute, were misled by the decisions which it evoked, to apply the doctrine of reputed ownership to all cases of conditional sales, accompanied by transfer of possession, in favor of the vendee's *bona fide* purchasers and creditors.³ They considered the doctrine to be as sweeping and as well established in English law as in the law of France or of Scotland. In a leading Pennsylvania case it was declared in these terms: "Possession of personal property is the great mark of ownership. It is almost the only index which the world in general has to look to. . . . Here the seller did not retain the possession, but was to retain the property after he had transferred the possession to the buyer. . . . It is a rule of general policy, which declares possession to be the evidence of property, and the presumption is, that every man is trusted according to the property in his possession."⁴

¹ *Horn v. Baker*, 9 East, 215 (1808).

² *Priestly v. Pratt*, L. R. 2 Ex. 101 (1867); *Crawcour v. Salter*, 19 Ch. D. 30, 53 (1881).

³ *Rose v. Story*, 1 Pa. St. 190 (1845); *Brundage v. Camp*, 21 Ill. 330 (1859). See *Harkness v. Russell*, 118 U. S. 663, at p. 670 (1886); and compare the reasons assigned in *Rose v. Story*, at p. 196, with those stated in *Lord v. Green*, 15 M. & W. 216, at p. 222. The Pennsylvania and Illinois courts do not apply this doctrine to cases of bailment. *Ott v. Sweatman*, 166 Pa. St. 217; 31 At. 102 (1895).

⁴ *Martin v. Mathiot*, 14 S. & R. 214 (1826); cf. this with the French

(o) *The Mercantile View*.—Although the foregoing extract does not contain an accurate statement of the common law upon this point, it fairly represents the contention of the mercantile community as to what the law should be;¹ and in compliance with mercantile demands, the doctrine of reputed ownership has been extended by statute in many jurisdictions to conditional sales of personal property. The provisions of these statutes are so various, however, that no attempt will be made to discuss them.²

(p) *Effect given to the Mercantile View by Factors Acts*.—A reputed ownership, also unknown to the common law, has been created in England and in a number of our States by statutes commonly known as "Factors Acts." Like the enactments relative to conditional sales, they differ too widely in detail to permit of adequate treatment in this place.³ But, speaking broadly, they have for their

maxim, "En fait de meubles possession vaut titre," and the Scotch maxim, "The property of movables is presumed from possession." The Pennsylvania courts have gone further in applying these principles than have those of Scotland; for the latter have declared that the possession of a conditional vendee is not reputed ownership, *Murdoch v. Greig*, 16 Sess. Cas. 395, 4th series (1889), — a decision in accord with *Harkness v. Russell*, *supra*.

¹ Chalmers' *Sale of Goods* (2d ed.), 118. "The merchants and bankers contended that, in the interests of commerce, if a person was put or left in possession of goods or documents of title, he ought, as regards innocent third parties, to be treated as the owner of the goods." *Farmers' Bank v. Logan*, 74 N. Y. 568, 586 (1878).

² 1 Stimson's *Am. Statute Law*, §§ 4550-4555. In a number of States contracts of conditional sale accompanied by a delivery to the buyer are declared to be absolutely void as against subsequent purchasers and mortgagees in good faith unless duly filed in a prescribed office. See 3 N. Y. R. S. (9th ed.), 2609-2612, L. 1884, ch. 315, as amended. English *Sale of Goods Act*, § 25 (2), applied in *Helby v. Matthews*, 95, A. C. 471; 11 *The Reports*, 232.

³ 1 Stimson's *Am. Statute Law*, §§ 4380-4388; English *Sale of Goods Act*, § 25 (1), also 52 & 53 Vict. ch. 45, *Factors Act* of 1889. See Appendix III.

primary object "the protection of third persons who, in good faith and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact hold it merely as factors or agents, having been intrusted by the owners with possession of the property or of documentary evidence of title to it."¹ They do not apply to cases, however, where "the possession of the factor or agent is, from the beginning, tortious, wrongful, and unlawful," but only to cases where the owner has "consciously and voluntarily intrusted the factor or other agent with the possession of the documents or merchandise;"² nor to the case of a vendor who is allowed by the purchaser to remain in possession of the goods or of documents of title thereto.³ Nor do they give any rights to the general creditors of the factor or agent in possession, or to his voluntary assignee. In the language of Willes, J., "the authority given by the Factors Acts *quoad* third persons is an authority superadded and accessory to the ordinary authority given by a principal to his agent. It was not intended by those acts to provide a remedy for all the hardships which may occur to innocent persons by dealing with one in the apparent ownership of goods as if he were the real owner; but only with cases where the agent is intrusted with and in possession of the goods with the assent of the true owner of them."⁴

(q) *Vendor's Retention of Possession.* — At common law, the title to goods may pass from the seller to the buyer

¹ *Commercial Bank v. Hurt*, 99 Ala. 130; 12 So. 568 (1892).

² *Soltan v. Gerdau*, 119 N. Y. 380, 390; 23 N. E. 864 (1890). The English legislation on this subject has received careful consideration in *Campbell on Sales* (2d ed.), 539-553.

³ *Johnson v. Credit Lyonnais Co.*, 3 C. P. D. 32 (1877).

⁴ *Fuentes v. Montis*, L. R. 3 C. P. 268 (1868). The court deals in this case with the acts prior to 40 & 41 Vict. c. 39; that is, with the statutes after which most American legislation has been fashioned.

without a change of possession. If the contract is an unconditional one for the present sale of specific chattels, the buyer becomes their owner by force of the contract. Title having vested in him, it can be divested only by his consent, or by operation of law. These principles, we have seen, are well established. It follows from them, that after the title to specific goods has vested in the buyer, neither the creditors of the seller nor his subsequent vendees can acquire title from him.¹

Anomalous Doctrine in a Few States; Delivery of Possession necessary to pass Title.—This doctrine of the common law prevails in most of our jurisdictions, save as it has been modified by statute. In a few States, however, the courts have adopted the rule “that delivery of possession is necessary to the conveyance of a title to personal chattels, as against every one except the vendor; and a subsequent purchaser, with no notice of a prior sale, receiving possession, has a better title than one who has purchased the same thing with no delivery of possession.”² The decision in which this rule was first announced is based largely on civil-law authorities, which the court understood to be in accord with those of the common law.³ Only two cases are cited in support of the sweeping proposition that “when the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession will hold them against the other.”

The first is from Massachusetts.⁴ It declared that the

¹ Blackburn on Sales (2d ed.), 260; *Meade v. Smith*, 16 Conn. 346 (1844).

² *Crawford v. Forristall*, 58 N. H. 114 (1877). In *Reed v. Reed*, 70 Me. 504, 506 (1880), it is said: “The law is well settled that without delivery the title does not pass as against an attaching creditor.” See *Huschle v. Morris*, 131 Ill. 587; 23 N. E. 643 (1890).

³ *Lanfear v. Sumner*, 17 Mass. 110 (1821).

⁴ *Lamb v. Durant*, 12 Mass. 54 (1815). See note to this case at p. 59, by D. A. Tyng, criticising it and *Lanfear v. Sumner*.

sale by one partner of a ship at sea did not give to the purchaser for value a complete and perfect title, but “that a subsequent possession within a reasonable time was necessary to complete the transfer;” and therefore that a third person who bought and received possession of the ship from the other partner, after the first sale but without notice, obtained a complete and perfect title, — the second sale “necessarily intercepting the title attempted to be passed by the first conveyance.”

Caldwell v. Ball misunderstood by the Massachusetts Court. — The other case which is cited arose out of the transfer of different parts of a bill of lading, by the owner of goods, to different parties. Although the action was in trover against the master who had signed the different parts, and the plaintiff claimed as transferee of the part first signed by him, all of the judges declared that the action was to be considered as one between *bona fide* indorsees of the different parts of the bill, and the only question was which transferee of the instrument was owner of the goods. At the trial, Willes, J., ruled that as the transferees were both “*bona fide* holders of the bills, he who had first got possession by a legal title ought to be preferred.” On the motion to set aside the verdict, which was for the defendant, Ashurst, J., observed, “Where equity is equal between the parties, a legal title must prevail. This reduces the question to a mere point of law.” He then proceeds to show that the different bills of lading (for the same cargo) were all in substance to the order of the shipper; that the indorsement of one of the bills to defendant’s principals was “an immediate transfer of the legal interest in the cargo,” and that as the legal title was vested in such principals, the shipper could not, by a subsequent transfer of the bill first signed by the master, convey any title to the plaintiff. Buller, J., held the same view; the bills were to be treated as made to the order of the shipper, and the question was,

“Who has the prior right under him? who has the legal title?” After referring to the fact that a bill of lading “is assignable in its nature; and by indorsement the property is vested in the assignee,” he concludes, “Both parties elaim under Thompson (the shipper), but France & Co. (defendant’s principals) have the first *legal right*, for the two bills of lading were first indorsed to them.”¹

Clearly, this case is no authority for the proposition to which it is cited by the Massachusetts court.

The Anomalous Doctrine supported by Considerations of Public Policy.—The courts of Illinois, while adopting the Massachnsetts rule, have rested it on considerations of commercial policy rather than on common-law principles. The rule of the common law, it is thought, “would operate most injuriously upon the trade of the eountry, as a person could never be safe in the purchase of personal property if his title was liable to be defeated by a prior sale of his vendor, made in some remote part of the country. . . . Possession of personal property has always been regarded as evidence of ownership, and publie policy requires that while personal chattels remain in the possession of the former owner, they should as to third persons be regarded as his.”²

These Considerations have induced Législation.—Considerations of this nature have led to the enactment of statutes in England³ and in some of our States,⁴ changing the rule of the common law,⁵ and giving to the vendor’s

¹ *Caldwell v. Ball*, 1 D. & E. 205, 210, 214, 215, 216 (1786).

² *Burnell v. Robertson*, 5 Gilm. (10 Ill.) 282, 291 (1848).

³ Sale of Goods Act, § 25 (1).

⁴ *Clafin v. Rosenberg*, 42 Mo. 439, 448 (1868); *Trimble v. Keet*, 65 Mo. App. 174; 2 Mo. App. Repr. 1212 (1895).

⁵ *Johnson v. The Credit Lyonnais*, 3 C. P. D. 32, 40 (1877). “These authorities fail to satisfy me that, at common law, the leaving by a vendee of goods bought, or the documents of title, in the hands of the vendor, till it suited the convenience of the former to take possession of

retention of possession in certain cases the effect of reputed ownership.

Delivery under this Rule. — Even in Massachusetts, the fact that the goods are left by the purchaser in the vendor's control will not prevent a "complete and perfect title" passing, provided the latter has delivered the goods to the former and thereafter holds them as the purchaser's bailee.¹ But it is said in a recent case, "the delivery required by the rule in *Lanfear v. Sumner* is delivery in its natural sense; that is, a change of possession."² In New Hampshire, if the goods are bulky or immovable, or are at such a distance from the purchaser that he cannot take actual possession at once, his title is valid even against the vendor's creditors or subsequent vendees, "if he take possession in a reasonable time."³ The duty of a purchaser, in that State, is set forth in the following terms, in a recent decision.⁴ "Admitting the good faith of the parties, and that they stand on equal grounds as to notice of each other's rights, the defendant neglected the very obvious duty of taking possession of the property; and the plaintiffs, finding it in the control of the vendor, should not be made to suffer for the defendant's neglect. . . . It was not at such a distance from the place of the trade that the defendant could not, by ordinary diligence, have asserted title and taken possession before the plaintiffs."

5. *Continued Possession by Vendor as Evidence of Fraud.* — Although, at common law, the vendee did not endanger his title by leaving the goods in the vendor's

them, would, on a fraudulent sale or pledge by the party possessed, divest the owner of his property or estop him from asserting his right to it."

¹ *Dempsey v. Gardner*, 127 Mass. 381, 382, and cases cited (1879).

² *Hallgarten v. Oldham*, 135 Mass. 1, 9 (1883).

³ *Ricker v. Cross*, 5 N. H. 570 (1832).

⁴ *Crawford v. Forristall*, 58 N. H. 114 (1877).

possession, yet under the statute against fraudulent conveyances,¹ his failure to take and retain possession was evidence that the alleged sale was a sham.

The earlier English decisions laid down the proposition that "if a man sells goods and still continues in possession as visible owner of them, such sale is fraudulent and void as to creditors," under the statute.² This doctrine was modified by later cases, and the rule was finally established that when, in the case of a bargain and sale, "the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud."³ Even while the earlier doctrine obtained, it was admitted that if the transaction did not purport to be a bargain and sale, but was a contract to sell, retention of the goods until some event happened or some condition was performed, did not render the transaction fraudulent; nor was a bargain and sale void for fraud upon creditors, if the seller retained possession of the goods in the capacity of agent of the vendee for sale.

(a) *The Earlier English Doctrine approved by Some Courts; Various Reasons.* — The earlier English doctrine

¹ The statutes of 13 Eliz. c. 5, and 29 Eliz. c. 5, declared that all feigned, covinous, and fraudulent gifts, grants, alienations, &c., devised to the intent to delay, hinder, or defraud creditors and others of their just and lawful actions, &c., should be utterly void unless made upon good consideration and *bona fide*.

² *Edwards v. Harben*, 2 D. & E. 587, 596 (1788). In *Twyne's Case*, 3 Coke, 80 b; *Moore*, 638 (1601), it was resolved that a sale of goods was fraudulent because (among other reasons) the seller "continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them." In *Bump on Fraudulent Conveyances* (4th ed.), §§ 85-97, the English cases are carefully examined.

³ *Cookson v. Swire*, 9 App. Cas. 653, 664 (1884). *May on Fraudulent Conveyances* (2d ed.), ch. 6.

has been adopted by a number of courts in this country.¹ It received Chief Justice Marshall's approval, because he thought it "best promoted the intent of the statute; and that fraudulent conveyances, which are made to secure to a debtor a beneficial interest while his property is protected from creditors, will be most effectually prevented by declaring that an absolute bill of sale is itself a fraud unless possession accompanies and follows the deed." . . . Such a deed must be considered as made with an intent 'to delay, hinder, or defraud creditors.'"²

For similar reasons, a few State courts have adopted this doctrine,³ while others have maintained it on different grounds. Some hold that the purchaser, by leaving the goods in the vendor's possession, confers upon the latter a reputed ownership which is conclusive in favor of his *bona fide* creditors and vendees;⁴ others have sustained it because they have "thought it better to take away the temptation to practise fraud than to incur the danger arising from the facility with which testimony may be manufactured to show that a sale was honest;"⁵ while still others

¹ Connecticut, Florida, Illinois, Kentucky, Montana, Nevada, New Hampshire, Pennsylvania, and Vermont profess allegiance to this doctrine.

² *Hamilton v. Russel*, 1 Cranch, 310, 318 (1803). In *Warner v. Norton*, 20 How. (U. S.) 448, 459 (1857), the later English doctrine seems to be approved.

³ *Holliday v. McKinne*, 22 Fla. 153, 165, 166 (1886); *Weeks v. Weed*, 2 Aik. (Vt.) 64, 68 (1826).

⁴ *Streeper v. Eckart*, 2 Whar. (Pa.) 302, 307 (1836); *Daniels v. Nelson*, 41 Vt. 161 (1868). In the latter case it was held that a tax-collector was not a creditor or purchaser of the vendor in possession, and, therefore, acquired no rights as against the vendee, by seizing the goods. But see *Stimson v. Wrigley*, 86 N. Y. 332.

⁵ *Huebler v. Smith*, 62 Conn. 186, 191; 25 At. 658 (1892). But the court held that a sale by a sheriff was not within the letter or the spirit of this doctrine. May on Fraudulent Conveyances (2d ed.), 133, *accord*. *Stimson v. Wrigley*, 86 N. Y. 332, *contra*.

have argued that it operates to throw the loss, which must be borne by one of two innocent parties, upon "him whose act or omission has made or contributed to make the loss possible."¹

When Vendee excused from taking Actual Possession. — Most of the courts which treat the retention of possession by the vendor as fraudulent in law, excuse the vendee from taking actual possession in certain cases, as where the goods are at sea, or a change in their location is impracticable. In a leading case on this subject it is said: "The retention of personal chattels, after a sale, is *prima facie* evidence of fraud, and the appropriate evidence to rebut the presumption is not the proof of the general good faith of the grantor, but an explanation of the intention, to show either that it is consistent with the deed, or is unavoidable, as in the case of a ship at sea, or is temporary, or for the reasonable convenience of the vendee."²

Statutory Provisions as to Vendor's Retention of Possession. — In a few States sales of personal property, unless accompanied and followed by an actual change of possession, have been declared by statute to be fraudulent and void as against the vendor's *bona fide* purchasers or creditors;³ and in most of the States statutes have been passed, pronouncing chattel mortgages and all conveyances of chattels intended to operate as mortgages, which

¹ Stephens v. Gifford, 137 Pa. St. 219, 229; 20 At. 542 (1890).

² Gibson v. Love, 4 Fla. 217, 241 (1851); McKibbin v. Martin, 64 Pa. St. 352, 357 (1870); Kingsley v. White, 57 Vt. 565 (1885). Upon this point, the decisions in each jurisdiction require careful and discriminating examination.

³ Rohrbongh v. Johnson, 107 Cal. 144; 40 Pac. 37 (1895); Finding v. Hartman, 14 Colo. 596; 23 Pac. 1004 (1890); Bowman v. Herring, 4 Harr. (Del.) 458 (1847); Wessels v. McCann, 85 Ia. 424; 52 N. W. 346 (1892); Claflin v. Rosenberg, 42 Mo. 439 (1868). Stimson's Am. Statute Law, § 4599. Bump on Fraudulent Conveyances (4th ed.), pp. 105-110.

are not accompanied and followed by an actual change of possession from the grantor to the grantee, absolutely void as against the vendor's *bona fide* creditors, purchasers and mortgagees, unless such conveyances are duly filed or registered.¹ Statutes of similar import have been enacted in Britain. The need and the nature of these acts are explained by Lord Blackburn in a recent case in the House of Lords.²

(b) *The Later English Doctrine prevails generally in this Country.* — While the earlier English doctrine, as laid down in *Edwards v. Harben*, prevails in many of our jurisdictions, the later doctrine has been accepted in most of the States. Continued possession by the vendor, after title has passed to the vendee, is not conclusive evidence of fraud. “The vendee may, notwithstanding, upon proof that the sale was *bona fide* and for a valuable consideration, and that the possession of the vendor, after such sale, was in pursuance of some agreement, not inconsistent with honesty in the transaction, hold under his purchase against creditors”³ or against subsequent purchasers from the vendor.⁴

Diverse Applications of the Doctrine. — It is to be noted, however, that the courts which hold this doctrine are not in entire accord in applying it. They “are at variance with each other and sometimes with themselves as to how far a vendee must go in such a case in his explanation of the transaction and possession, to exonerate himself.”⁵ In the case from which the foregoing quotation is made, the court held that “the continuance in possession by the

¹ Stimson's Am. Statute Law, § 4350.

² *Cookson v. Swire*, 9 App. Cas. 653 (1884).

³ *Brooks v. Powers*, 15 Mass. 244 (1818).

⁴ *Phillips v. Reitz*, 16 Kans. 396 (1876).

⁵ *Valley Distilling Co. v. Atkins*, 50 Ark. 289, 291; 7 S. W. 137 (1887).

vendor after the sale . . . is *prima facie* evidence of a secret trust which is fraudulent as to creditors, and if unexplained, the presumption becomes conclusive;” while other courts treat such continued possession as “only evidence of fraud to be submitted to the jury.”¹

However, the prevailing view is, undoubtedly, that a *bona fide* purchaser from the vendor in possession or his creditor, makes out a *prima facie* case of sham or fraudulent sale by proof that the property remained in the unchanged possession of the vendor; and that the vendee must give evidence of the fairness of the sale in order to take the case to the jury.²

Diverse Views of Possession. — These courts differ, also, as to what constitutes a change of possession. On the one hand, it is said that “a legal or constructive delivery” is “enough to satisfy the law,” and that such a delivery takes place upon a bargain and sale, by the mere agreement of the parties that the vendor shall thereafter hold the property as the buyer’s bailee, although there is no visible change of possession.³ On the other hand, and generally, it is held that while “the bulky and cumbersome character of articles sold affects the nature of acts of delivery and taking possession, some act definite and distinct is always required. Actual removal” may not be “necessary, but something tantamount to an actual delivery, some plain surrender of possession on the one hand, and assumption of it, on the other, is necessary.”⁴

In Massachusetts, as we have seen, a true delivery is

¹ Reed v. Jewett, 5 Greenl. (Me.) 96, 102 (1827).

² Bump on Fraudulent Conveyances (4th ed.), § 111.

³ Shaul v. Harrington, 54 Ark. 305, 310; 15 S. W. 835 (1891); Hight v. Harris, 56 Ark. 98; 19 S. W. 235 (1892).

⁴ Stimson v. Wrigley, 86 N. Y. 332, 338 (1881); Seavey v. Walker, 108 Ind. 78, 82; 9 N. E. 347 (1886); cf. Thorndike v. Bath, 114 Mass. 116 (1873).

necessary to perfect the title in the purchaser as against the vendor's creditors and subsequent vendees. If delivery has been made, subsequent "possession by the vendor is only evidence of fraud, and the sale is not void against a subsequent purchaser, unless fraud in fact is proved."¹

§ 9. Specific Performance by the Seller may be decreed.

Suits by the purchaser for specific performance by the seller are rarely maintainable. This is not because of the personal nature of the subject-matter of sale contracts, but "because damages at law calculated upon the market-price of the stock or goods are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods."²

It happens, however, at times, that the articles contracted for are of such a character that they cannot be duplicated in the market, and their value cannot be properly ascertained by a jury. Of this kind is "an old altar-piece, made of silver, remarkable for a Greek inscription and dedication to Hercules;"³ or "a silver tobacco-box . . . adorned with several engravings of public transactions and heads of distinguished persons;"⁴ or "china jars of unusual beauty, rarity, and distinction;"⁵ or "a faithful or family slave, endeared by a long course of service or early association."⁶ In the case last cited, it was declared that "no damages can compensate; for there is

¹ *Thacher v. Moss*, 134 Mass. 156, 165 (1883).

² *Adderley v. Dixon*, 1 Sim. & Stu. 607, 610; 2 Keener's Cas. Eq. Juris. 13 (1824).

³ *Duke of Somerset v. Cookson*, 3 P. Wm. 390 (1735).

⁴ *Fells v. Reed*, 3 Ves. 70 (1796).

⁵ *Falcke v. Gray*, 4 Drewry, 651 (1859).

⁶ *Williams v. Howard*, 3 Murphey (N. C.), 74, 80 (1819).

no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." Letters patent and patented articles¹ are of the same class.

The principle governing the foregoing cases applies to contracts for the sale of claims against insolvent persons. A jury called upon to value such claims would be forced to resort to conjecture.² It applies, also, to a contract for the sale of corporate stock which has never been sold in the market, and which by the agreement between the parties is to be transferred only in accordance with a stipulated appraisal,³ as well as to contracts for goods of which the seller has the only supply fairly available to the buyer.⁴ In such cases the extreme difficulty, if not impossibility, of giving the buyer adequate damages at law warrants a court of equity in decreeing specific performance by the seller.

§ 10. Damages for Breach of an Essential Term of the Contract.

An extended discussion of this topic would not be consistent with the plan of the present work; and yet a brief statement of the general principles governing the assessment of damages for the seller's breach of his contract is proper, if not necessary.

¹ *Cogent v. Gibson*, 33 Beav. 557; 2 Keener's Cases on Eq. Juris. 86 (1864); *Corbin v. Tracy*, 34 Conn. 325; 2 Keener's Cases on Eq. Juris. 34 (1867); *Hull v. Pitrat*, 45 Fed. 94 (1891); *Adams v. Messenger*, 147 Mass. 185; 17 N. E. 491; 2 Keener's Cases on Eq. Juris. 41 (1888).

² *Cutting v. Dana*, 25 N. J. Eq. 265; 2 Keener's Cases on Eq. Juris. 60 (1874).

³ *N. Eng. Trust Co. v. Abbott*, 162 Mass. 148, 154; 38 N. E. 432 (1894).

⁴ *Equit. Gas Co. v. Baltimore Co.*, 63 Md. 285; 2 Keener's Cases on Eq. Juris. 35 (1884).

1. *General Rule.* — “Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract-price and the market-price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy.”¹ Accordingly, one who contracts for the purchase of dies, to be used in the manufacture of lanterns, is entitled to recover as damages from the seller, upon the latter's failure to deliver the dies, the difference between the contract-price and the price at which they could be obtained from other sellers.² Such also is the measure of damages for the seller's breach of his contract to sell and deliver municipal bonds.³

(a) *Market-Price at Time and Place of Delivery.* — If the contract fixes the time and place of delivery, the market-price at such time and place is to be resorted to in estimating the damages. “The wrong is done when the contract is broken, and the value of the thing when and where it ought to be delivered, is the indemnity.”⁴

If they are not fixed by the contract, we have seen that the law regulates them. In such a case, the date of the seller's refusal to deliver is the time at which the market-price is to be taken. “A party's right of recovery must be deemed fixed at some time, and he cannot wait for an indefinite period and speculate upon the changes in the market while taking upon himself none of the risks of decline. . . . A recovery which, at the time of the demand and refusal, would have enabled the party to purchase other

¹ *Barrow v. Arnaud*, 8 Q. B. 595, 609 (1846) ; *Billmeyer v. Wagner*, 91 Pa. St. 92, 95 (1879) ; *Peace River Co. v. Grafflin*, 58 Fed. R. 550, 552 (1893).

² *Rochester Lantern Co. v. Stiles & Parker Co.*, 135 N. Y. 209, 218 ; 31 N. E. 1018 (1892).

³ *Coffin v. State*, 144 Ind. 578 ; 43 N. E. 654 (1896).

⁴ *Shaw v. Nudd*, 8 Pick. (Mass.) 9, 14 (1829).

property of the like kind and of equal value at the same place, is, in the absence of special circumstances, as nearly just as any the law can provide for.”¹

2. *No Available Market.* — It often happens that the buyer has no market to which he can resort for the purchase of the stipulated goods. In such a case his loss cannot be determined by a comparison of the contract-price with the market-price, for there is no market-price; it must be determined by some other method.

The general principle to be applied in these cases is that upon which the rule, already considered, rests. It was announced in a leading case in these words: “The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.”²

Hence, if there is no market for the stipulated goods at the time and place of delivery, the buyer may show his loss by evidence of “the value which he would have received had the seller faithfully performed his contract;”³ and this value may be arrived at by adding to the prime cost the expense of transit, and a reasonable profit to the buyer;⁴ or the loss may be shown by evidence of the price at which the buyer had contracted to sell them, whether the

¹ Chadwick v. Butler, 28 Mich. 349, 353 (1873).

² Griffin v. Colver, 16 N. Y. 489, 494, 495; 69 Am. Dec. 718 (1857).

³ Bridge v. Wain, 1 Stark. 504, 506 (1816) (scarlet cuttings for the Chinese market).

⁴ O'Hanlan v. Great W. Ry., 6 B. & S. 484 (1865).

contract of sub-sale had been notified to the seller or not.¹

If goods similar to those contracted for can be obtained at the place of delivery while the exact goods are not available, the buyer will be justified in purchasing such goods to replace those which the seller has failed to furnish, although their market-price may be higher than the fair value of the stipulated articles. Under such circumstances, it has been held, “the value of the goods contracted to be supplied by the defendants” (the sellers) “at the time of their breach of contract was the price the plaintiff” (the buyer) “had to give for the substituted article.”²

3. *Special Damage*. — The rule on this subject has been stated as follows: “Where the contract is made under such circumstances that particular consequences are at the time of making it in the contemplation of both parties as the necessary or probable result of a failure to deliver the goods, then if such failure occurs, and these consequences ensue, the buyer may recover the loss thereby sustained as damages for the breach.”³ A few cases must suffice to show the application of this rule.

(a) *Particular Consequences not contemplated by the Seller*. — A lumber manufacturer contracted for the purchase of two million feet of logs to be delivered on a certain stream from which point they were to be driven by the purchaser. The seller was not advised that the buyer was contracting for the logs for the supply of his mill, or for any other special purpose. They were not delivered, and the buyer sought to recover as damages not only the difference

¹ Stroud v. Austin, 1 C. & E. 119 (1883); Grébert-Borgnis v. Nugent, 15 Q. B. D. 85, 87, 88 (1885); Loescher v. Deisterberg, 26 Ill. App. 520 (1887); Trigg v. Clay, 88 Va. 330; 29 Am. St. R. 723; 13 S. E. 434 (1891).

² Hinde v. Lindell, L. R. 10 C. P. 265, 270 (1875).

³ Campbell on Sales (2d ed.), 504.

between the contract-price and the market-price at the time and place of delivery, but also special damages which he had suffered as a manufacturer "by reason of his mill standing idle for the want of logs on which to operate." The court rejected his claim for special damages, on the ground that the parties could not be presumed to have had them in contemplation.¹

(b) *The Seller notified of Particular Consequences.* — On the other hand, the same court awarded special damages to a buyer who had contracted for a locomotive engine, to take the place of horses and mules in drawing coal-cars. The direct consequence of not getting the engine, it was held, was that the buyer was "obliged to continue transporting the coal as before by horses and mules," and "that this consequence must have been in full view of the sellers when they entered into the contract," the court entertained no doubt. The buyer was allowed, therefore, to recover as special damages "the difference of expense of transportation between the old mode and the one stipulated for in the contract." But this did not content him. He asserted that he could have mined one-third more coal with the engine than by the old mode, and asked for the profits which would have resulted from such enlargement of his business. This claim the court rejected, as there was no evidence that such particular consequences were or ought to have been within the contemplation of the sellers.²

(c) *Seller and Buyer need not be agreed as to the Precise Consequences.* — In a modern English case, the seller sought to escape the payment of special damages, because he and the buyer were "not precisely *ad idem* as to the use of the article in question." He supposed that the "hull of a floating boom derrick," which he contracted to sell, was

¹ Fessler v. Love, 48 Pa. St. 407 (1864).

² Pittsburg Coal Co. v. Foster, 59 Pa. St. 365.

to be used by the purchaser as a coal store, when in fact the purchaser intended to place in it large hydraulic cranes and machinery for the purpose of transshipping coal direct from colliers into barges. The court declared that the principle applicable to such a case is this: "Although the buyer may have sustained a loss from the non-delivery of an article which he intended to apply to a special purpose, and which, if applied to that special purpose, would have been productive of a larger amount of profit, the seller cannot be called upon to make good that loss, if it was not within the scope of his contemplation that the thing would be applied to the purpose from which such larger profit might result; and although in point of fact the buyer does sustain damage to that extent, it would not be reasonable or just that the seller should be called upon to pay it to that extent, but to the extent to which the seller contemplated that, in the event of his not fulfilling his contract by the delivery of the article, the profit which would be realized if the article had been delivered would be lost to the other party, to that extent he ought to pay. The buyer had lost the larger amount, and there can be no hardship or injustice in making the seller liable to compensate him in damages so far as the seller understood and believed the article would be applied to the ordinary purposes to which it was capable of being applied."¹

(d) *Special Damages when Seller knows the Goods are for Resale.* — If the seller enters into the contract aware that the buyer orders the article with a view to selling it again, the profits which would have been realized upon a resale may be recovered by the buyer as damages.² Such profits are certainly within the contemplation of both parties to such a contract.

¹ *Cory v. Thames Co.*, L. R. 3 Q. B. 181, 190 (1868).

² *Blue Grass Cordage Co. v. Luthy*, Ky. ; 33 S. W. 835 (1896).

Again, if the seller's default subjects the buyer to the payment of penalties to his purchaser, because of the provisions of the sub-contract made known to the original seller, they may form a part of the first buyer's damages;¹ and if the default naturally brings upon the first buyer an action and judgment for damages for his breach, such recovery may be an element in the first buyer's claim for damages against his vendor. The general rule applicable to such cases is, that "the original vendor is liable, in the case of a breach of contract, for the natural consequences of so much of the sub-contract as was made known to him, . . . but only to that extent."² That the sub-contract was made known to the original seller may be inferred from the previous course of dealing between him and the first buyer.³

(e) *Expenses in Transporting and Caring for the Goods, as Special Damages.* — So, too, if the seller tenders goods which do not conform to the contract, he will be liable to the buyer for all necessary expenses in testing them, as well as for all reasonable and customary payments by the latter for insurance, freight, cartage, and storage. In such a case, if the buyer is able to obtain the described goods in the market, his total damages would embrace the difference between the market-price and the contract-price, and also the expenses above referred to.⁴

(f) *Conjectural Profits.* — It has already appeared that profits which would have been realized by the purchaser, had the seller performed his contract, may be recovered as damages for the seller's breach. The only conditions of recovery are, that they should have been

¹ *Elbinger v. Armstrong*, L. R. 9 Q. B. 473 (1874).

² *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, 90 (1885).

³ *Gillespie v. Cheney* (1896), 2 Q. B. 59.

⁴ *Whiting Co. v. White Lead Works*, 58 Mich. 29; 24 N. W. 881 (1885).

fairly within the contemplation of the parties as the natural consequences of the breach, and that their amount should be reasonably certain.

It is not necessary that the amount be susceptible of exact calculation,¹ but the buyer must establish as a fact that profits would have been realized. If the business in which he would have used the articles be a new and untried one in his locality, and his evidence furnishes a basis for conjectures only as to whether any profits would have resulted to him from the vendor's performance of the contract, his claim for profits as an element of damages must fail.²

4. *Duty of the Injured Party to minimize Damages.*— Damages are not awarded against one who breaks his contract with a view to punishing him, but with a view to compensating the other party for the loss occasioned by the breach. The seller's default, therefore, must be the natural and proximate cause of the loss. If, upon such default, the buyer can mitigate the consequences by reasonable efforts, but fails to make any attempt, he does not act the part of an ordinarily prudent man. The seller has a right to suppose that the buyer will act such a part. Damages which might have been avoided by such action cannot be deemed the natural and probable consequences of the seller's default, but of the buyer's imprudence.³

Accordingly, the rule has become well settled that the buyer is bound to use all reasonable efforts to minimize the injurious effects of the seller's default.⁴ Even if the defaulting seller is the only person from whom he can obtain the articles, he may be bound to secure them from such person on the best terms practicable.⁵

¹ *Wakeman v. Manufacturing Co.*, 101 N. Y. 205; 4 N. E. 264 (1886).

² *Gas Co. v. Glass Co.*, 56 Kans. 614; 44 Pac. 621 (1896).

³ *Watson v. Kirby*, 111 Ala. ; 20 So. 624, 627, 628 (1896).

⁴ *Copper Co. v. Copper Mining Co.*, 33 Vt. 92 (1860).

⁵ *Lawrence v. Porter*, 63 Fed. 62 (1894).

And if he obtains the goods from some other source below the market-price, his damages will be the difference between the contract-price and that which he paid.¹

§ 11. Damages for Breach of Warranty.

Thus far we have been considering the measure of the buyer's damages for a breach by the seller of an essential term of the contract in cases where the buyer has not taken title to the goods. If, notwithstanding such a breach by the seller, the buyer accepts the goods, he cannot reject them thereafter, but, having waived the operation of the essential term as a condition, is now limited to a claim for damages, precisely as he would have been had this engagement been from the first a collateral agreement or warranty in its narrow sense.²

(a) *General Principles.* — The ordinary measure of damages for a breach of warranty is "the difference between the actual value of the article sold and the value of the same article if it had been such as the vendor warranted it to be."³ If the contract-price is less than the fair value, the buyer "is entitled to the benefit of the contract."⁴ And if he resells the property, though without a warranty on his part, the price which he receives does not fix the amount of his damages;⁵ at most, it affords evidence of the real value of the property.⁶

(b) *Special Damages.* — The general principles which are applicable to special damages for the breach of an

¹ Arnold v. Blabon, 147 Pa. 372; 23 At. 375 (1892); Theiss v. Weiss, 166 Pa. 9; 31 At. 63 (1895).

² *Supra*, p. 127; Campbell on Sales (2d ed.), 510, 511.

³ Brown v. Bigelow, 10 Allen (92 Mass.), 242 (1865).

⁴ Brook v. Clark, 60 Vt. 551, 553 (1888); Murray v. Jennings, 42 Conn. 9 (1875).

⁵ Case Plow Works v. Niles, 90 Wis. 590, 606; 63 N. W. 1013 (1895).

⁶ Bach v. Levy, 101 N. Y. 511; 5 N. E. 345 (1886).

essential term of the contract, and which have been presented in the last preceding section, govern this species of damages for the breach of a warranty.

Accordingly, if coal is sold with a warranty by one knowing that the buyer is purchasing for the purpose of reselling it as coal of the warranted description, the first buyer's damages may include the costs of an action unsuccessfully defended by him for a breach of his sub-warranty.¹ If seed is sold to a market-gardener, and warranted to be Bristol cabbage seed, when it is not, the buyer may recover as damages "the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage, such as would ordinarily have been produced in the year in which the seed was sown."²

Diseased Animals: Poisonous Substances. — Again, a seller of diseased animals, with a warranty of soundness, is liable for all the loss sustained by the buyer which was the natural and probable result of the breach. One who sells diseased cows³ or horses or sheep,⁴ with a warranty of soundness, to a farmer, who may be expected to put them with other animals, may be liable in damages not only for the difference between the value of the animals with the disease and their value if sound, but also for the injury to other animals with which they were placed. And if oats are sold, with a warranty of fitness for use, to an owner of horses, but which contain a mixture of seeds harmful to horses, the seller may be subject to an extensive liability to the buyer for the value of the horses which

¹ *Hammond v. Bussey*, 20 Q. B. D. 79 (1887).

² *White v. Miller*, 71 N. Y. 118, 132 (1877); *cf.* *Wolcott v. Mount*, 35 N. J. L. 262 (1873); *Wagstaff v. Shorthorn Dairy Co.*, 1 C. & E. 324 (1885).

³ *Smith v. Green*, 1 C. P. D. 92 (1875).

⁴ *Sherrod v. Langdon*, 21 Ia. 519 (1886); *Joy v. Bitzer*, 77 Ia. 73, 80; 41 N. W. 575 (1889).

died, for the injury to those which survived, for the value of their use while sick, and for expenses incurred in doctoring and caring for them.¹

Profits as Special Damages. — Profits which the buyer can establish with reasonable certainty he would have made had the warranted article conformed to the sale contract, may be recovered if the facts show that such profits were within the contemplation of the parties when the contract was entered into. The manufacturer of a refrigerator, who warrants that it will “keep chickens for the early spring market,” will be liable not only for the difference between the value of the refrigerator as furnished and its value had it conformed to the contract, but to the spring-market value of the chickens, which were lost because of its defects, less the cost of getting them to market and the expenses of selling them.²

§ 12. Interest as Damages.

In England the buyer is rarely entitled to recover interest upon his principal claim for damages.³ The “state of the law in this country upon the subject is uncertain.”⁴ It appears, however, to be the prevailing view that the buyer is entitled to interest on whatever of his principal claim can be treated as liquidated, to be reckoned from the date of the seller’s breach or default; and that damages will be treated as liquidated when they can be “determined by computation simply, or by reference to market values.”⁵ But if the claim is unliquidated, as in the case

¹ *Coyle v. Baum*, 3 Okl. 695; 41 Pac. 389 (1895).

² *Beeman v. Banta*, 118 N. Y. 538; 23 N. E. 887 (1890).

³ *Brown*, Sale of Goods Act, 236, 237; 3 & 4 Will. IV. c. 42, § 28.

⁴ *White v. Miller*, 78 N. Y. at p. 395.

⁵ *White v. Miller*, 71 N. Y. at p. 134; *Gray v. Hall*, 29 Kans. 704 (1883); *Thomas v. Wells*, 140 Mass. 517; 5 N. E. 485 (1885).

of damages sustained by a purchaser who has bought and planted spurious cabbage seed, which was warranted to be "Bristol cabbage seed," interest cannot be set running either by a demand for damages, or by the commencement of an action therefor.¹

¹ *White v. Miller*, 78 N. Y. 393 (1879).

CHAPTER VI.

DUTIES OF BUYER. — RIGHTS OF SELLER.

HAVING discussed the duties of the seller to transfer title and to give possession, we pass now to a consideration of the corresponding duties of the buyer to take title and possession, and to pay for the property.

§ 1. **The Duty to take Title.**

In the case of a contract to sell, as distinguished from a contract of bargain and sale, the title to the goods is to be transferred at a future time. Upon performance, or tender of performance, by the seller, as described in the preceding chapter, it becomes the duty of the buyer to accept the goods and thus take title to them. What constitutes an acceptance by the purchaser has been discussed in other connections,¹ and need not be reconsidered here. At present we are especially concerned with the consequences of the buyer's breach of his duty to accept.

1. *Seller's Claim is for Damages.* — Can he, by refusing to accept goods which are tendered by the seller in conformity to the contract, prevent the transfer of title to him, and thus limit the seller to an action for damages? In England² and in many of our jurisdictions this question has received an affirmative answer. Even though the buyer has agreed to take title to such goods as are tendered, yet till he assents to the transfer of the specific

¹ *Supra*, pp. 69, 128. Sale of Goods Act, §§ 34, 35.

² *Jenner v. Smith*, L. R. 4 C. P. 270 (1869).

goods which are offered, the property therein will not be changed.¹ “Both parties must be pledged, the one to give and the other to accept those specific goods. This is obviously just, for until both parties are so agreed, the appropriation cannot be binding upon either; not upon the one, because he has not consented, nor upon the other, because the first is free.”²

Inasmuch as the title to the goods remains in the seller, his right against the buyer, who wrongfully refuses to accept, is to recover such damages as the latter's breach has inflicted upon him, and not to recover the purchase-price.³ “The seller may take his goods into the market and obtain the current price for them.”⁴ Nor can the seller recover the contract-price as that of labor and materials supplied to the buyer, for the materials are still the property of the seller, and the labor was bestowed upon his property and not upon that of the buyer.⁵

2. *Seller's Right to Price upon Tender of Stipulated Goods.* — In some jurisdictions, however, it is held that if the seller duly tenders the goods in conformity to the contract, “the right of property passes to the vendee,” and that upon the latter's refusal “to accept and pay the price, the vendor may recover the contract-price, in which case he holds the property as trustee for the vendee.”⁶

Other courts limit this doctrine to cases where “the subject-matter of the contract is a specific article to be manufactured by the vendor for the vendee,” which has

¹ *Moody v. Brown*, 34 Me. 107 (1852).

² *Blackburn on Sales* (2d ed.), 129.

³ *Jones v. Jennings Bros.*, 168 Pa. 493, 497; 32 A. 51 (1895).

⁴ *Barrow v. Arnaud*, 8 Q. B. (Ad. & E. N. S.) 604, 610 (1846).

⁵ *Hosmer v. Wilson*, 7 Mich. 294 (1859); *Butler v. Butler*, 77 N. Y. 472 (1879).

⁶ *Hayden v. Demets*, 53 N. Y. 426, 431 (1873); *Shawhan v. Van Nest*, 25 Ohio St. 490 (1874).

been made and tendered in accordance with the contract stipulations.¹

Two arguments are urged in support of this view: first, that an article manufactured for a special purpose may be of little value to any one else, and therefore it is but fair to the seller that he should recover the contract-price, upon the buyer's breach; second, that this "rule (giving title to the vendee against his will and the purchase-price to the seller) will be less disastrous to the purchaser than a sale in an open market" by the seller, and his recovery of the difference between the price thus obtained and the contract-price.²

The answer to the first argument is that if the goods have no market value, the seller may recover as damages for breach of the contract a sum equal to the contract-price;* and in reply to the second argument, it may be said that it is not incumbent upon courts to disregard well-established legal principles in order to relieve a contract-breaker from the ordinary consequences of his acts.

3. *Contract may bind Buyer to pay Price whether Title passes or not.* — Undoubtedly the contract may be so framed as to give to the seller the right to sue for the agreed price without regard to the time when title is to be transferred, and without regard to the continued existence of the goods.⁴ A buyer who agrees to pay on a specified day, if he shall not require delivery before that date, upon making default in payment, cannot defend an action for the price on the ground that the goods are still owned by the plaintiff,⁵ nor is such defence available to one who has

¹ Black River Lumber Co. v. Warner, 93 Mo. 374, 387; 6 S. W. 210 (1887).

² Gordon v. Norris, 49 N. H. 376, 384 (1870), and case in last note.

³ Tufts v. Grewer, 83 Me. 407, 412; 22 At. 382 (1891).

⁴ Dunlop v. Grote, 2 C. & K. 153 (1845). Sale of Goods Act, § 49 (2).

⁵ Burnley v. Tufts, 66 Miss. 48; 5 So. 627 (1888).

bound himself to pay for goods, "in consideration of their delivery for him, freight prepaid, at the express office specified" in the contract.¹

§ 2. Damages for Non-Acceptance.

Ordinarily, these are the difference between the contract-price and the market-price at the time and place for delivery.² If the latter equals or exceeds the former,³ or if no price is named in the contract,⁴ or if by its terms the seller is to receive the market-price, or if the seller fails to show a difference between the price agreed upon and the market-price,⁵ his recovery will be confined to nominal damages.

1. *When Market-Price is Abnormal.* — It may happen, however, that the market-price, at the time and place for delivery, does not represent the fair value of the goods by reason of a wrongful combination of those controlling the price,⁶ or because the seller monopolizes the supply at the place where delivery is to be made.⁷ In such cases, as well as in cases where there is no market for the goods at the time and place for delivery, other evidence must be resorted to for the purpose of showing "the loss directly

¹ *White v. Solomon*, 164 Mass. 516 ; 42 N. E. 104 (1895). The dissenting judges treated the contract as one for a conditional sale, under which the goods had been returned to and retained by the seller ; and held that his action should have been for damages caused by the vendee's breach of his contract to accept, and not for the purchase-price.

² *Tufts v. Bennett*, 163 Mass. 398 ; 40 N. E. 172 (1895).

³ *Foss v. Sabin*, 84 Ill. 564 (1877).

⁴ *McGrath v. Cannon*, 55 Minn. 457, 461 ; 57 N. W. 150 (1893).

⁵ *Unexcelled Fireworks Co. v. Polites*, 130 Pa. St. 536 ; 18 At. 1058 (1889) ; *McGrath v. Gegner*, 77 Md. 331, 340 ; 26 At. 502 (1893).

⁶ *Kountz v. Kirkpatrick*, 72 Pa. 376 (1872).

⁷ *Grand Tower Co. v. Phillips*, 23 Wall. (U. S.) 471 (1874).

and naturally resulting, in the ordinary course of events, from the buyer's breach of contract."¹ The seller, in disposing of the goods, which are wrongfully rejected by the purchaser, must act in a reasonable manner, but is not "under any obligation to do anything otherwise than in the ordinary course of business."² Hence, if there is no market for the goods at the place of delivery, he may ship them to "some other reasonably convenient place" and "deduct the reasonable cost of transportation to that place" from their market value there;³ or he may show their fair value at the place stipulated for delivery, by proving the market-price of like goods at or about the time for delivery in neighboring places.⁴ But if there is a market at the place for delivery, he will not be justified, ordinarily, in sending and selling them elsewhere, for the purpose of fixing his damages.⁵

2. *Premature Repudiation by Purchaser.* — In case the buyer repudiates the contract before the time for delivery arrives, the seller may treat such repudiation as inoperative,⁶ and, upon the buyer's failure to discharge his contract obligations at their maturity, hold him responsible for all the consequences of non-performance, or he may treat such "repudiation as a wrongful putting an end to the contract, and at once bring his action as on a breach of it." If he elects the first course, "he keeps the contract alive for the benefit of the other party as well as his own,"⁷ and when he sues upon the contract he "must.

¹ Sale of Goods Act, § 50 (2).

² *Dunkirk Co. v. Lever*, 9 Ch. D. 20, 25 (1878).

³ *Dwiggins v. Clark*, 94 Ind. 49, 56 (1883).

⁴ *McCormick v. Hamilton*, 23 Gratt. (Va.) 561, 577 (1873); *Ingram v. Wackemagil*, 83 Ia. 82, 86; 48 N. W. 998 (1891).

⁵ *Chapman v. Ingram*, 30 Wis. 290 (1872).

⁶ *Roper v. Johnson*, L. R. 8 C. P. 167, 177 (1873).

⁷ *Frost v. Knight*, L. R. 7 Ex. 111 (1872).

allege and prove performance upon his part, or a legal excuse for non-performance.”¹

Moreover, “in assessing the damages the jury will take into consideration whatever the plaintiff has done, or has had the means of doing, and as a prudent man ought to have done, whereby his loss has been, or would have been, diminished.”² Hence it is held, generally, that upon the purchaser’s repudiation of a contract for an article to be manufactured, the seller is not justified in completing the article for the purpose of charging the full contract-price or of increasing the damages.³ Whether he completes it or not, his damages are the difference between the contract-price and what it would cost him to manufacture and deliver it under the contract, or, in other words, the “profits which the performance of the contract by the vendee would have produced to him.”⁴

3. *Seller may sue as soon as Buyer repudiates.*—In case the seller elects to treat the repudiation by the vendee as a ground for rescinding the contract, he may bring his action for damages at once,⁵ but his damages will be the difference between the contract-price and the market-price at the time or times fixed for delivery, and not at the time of the buyer’s repudiation, nor at the commencement of the action.⁶ If the trial takes place before the time for performance has arrived, the assessment of damages may be difficult, but the difficulty “is no reason for refusing to fix them,”⁷ nor is it insuperable.

¹ *Lake Shore Ry. v. Richards*, 152 Ill. 59, 80; 38 N. E. 773 (1894).

² *Roper v. Johnson*, *supra*, at p. 181.

³ *Tufts v. Weinfeld*, 88 Wis. 647; 60 N. W. 992 (1894). But see *Kadish v. Young*, 108 Ill. 170 (1883).

⁴ *Todd v. Gamble*, 148 N. Y. 382, 390; 42 N. E. 982 (1896).

⁵ *Windmuller v. Pope*, 107 N. Y. 674; 14 N. E. 436 (1887). But see *Daniels v. Newton*, 114 Mass. 530 (1874); *Dingley v. Oler*, 117 U. S. 490; 6 Sup. Ct. 850 (1885).

⁶ *Roper v. Johnson*, L. R. 8 C. P. 167 (1873).

⁷ *Mayne on Damages* (5th ed.), 174.

4. *Interest on the Agreed Price.*—This is not recoverable in England, in the absence of a contract for its payment, unless the price “is payable by virtue of some written instrument at a certain time.”¹ In Scotland and in this country interest on the price is recoverable from the date when the price should have been paid.² If the action, however, is for damages for non-acceptance by the buyer, and these are unliquidated, interest is not allowable.³

§ 3. Buyer's Duty to take away the Goods.

Not only is the buyer bound to take title to the goods, but he is also bound to take them away. If he fails to discharge this obligation within a reasonable time, “the seller may charge him warehouse room; or he may bring an action for not removing them, should he be prejudiced by the delay.”⁴ Such at least is the rule in England,⁵ and it has been followed to some extent in this country,⁶ although it was rejected in a recent Massachusetts case. According to this decision, if the vendee refuses to take the goods, at least if that refusal is based on the ground that title has not vested in him, owing to the non-conformity of the goods to the contract, he cannot be made liable to the vendor for their care and custody. “If the vendor wishes to avoid the expense of keeping, and at the same time to avail himself of the value of the property, he may sell under an implied agency for the vendee, and sue for

¹ 3 & 4 Will. IV. c. 42, § 28; Chalmers' Sale of Goods Act (2d ed.), 91.

² Brown's Sale of Goods Act, p. 237; *White v. Miller*, 78 N. Y. 393, 399 (1879).

³ *Hewes v. German Fruit Co.*, 106 Cal. 441; 39 Pac. 853 (1895).

⁴ *Greaves v. Ashlin*, 3 Camp. 426 (1813).

⁵ Sale of Goods Act, § 37.

⁶ *Dibble v. Corbett*, 5 Bos. (N. Y.) 202 (1859); Story on Sales, § 404.

the balance above what he obtains after paying the reasonable expenses.”¹

§ 4. The Seller's Lien.

This right of the seller does not exist until title has passed to the buyer; until this event transpires, “the seller’s right is that of an undivested owner;” “it is a contradiction in terms to say a man has a lien upon his own goods.”² “The very definition of a lien is a right to hold goods, the property of another, in security for some debt, duty, or other obligation. If the holder is the owner, the right to retain is a right incident to the right of property; if he have had a lien, it is merged in the general property.”³ The seller’s lien is not the creature of contract, but is “conferred by the law,”⁴ although the parties may limit or extend its application by agreement, or may waive it altogether.

The conditions upon which this right is exercisable are the following: First, The seller must be unpaid in whole or in part. Second, He must be in possession of the goods. Third, The goods must have been sold without any stipulation as to credit, or if credit was given, it

¹ Putnam v. Glidden, 159 Mass. 47; 34 N. E. 81 (1893); cf. Bartholomew v. Freeman, 3 C. P. D. 316 (1878).

² Lickbarrow v. Mason, 6 East, 21, 25 (1793). This contradiction in terms is found not infrequently in the decisions. In Higgins v. Murray, 73 N. Y. 252, 255, it is said that although the title had not passed from the plaintiff to the defendant, “the plaintiff had a lien upon the article for the value of his labor and materials.”

³ Arnold v. Delano, 4 Cush. (58 Mass.) 33, 38 (1849).

⁴ Blackburn on Sale (2d ed.), 447-454. After comparing the rights of an unpaid vendor, as now established, with his rights if they depended on the agreement of the parties merely, the author concludes, “the vendor’s rights in possession, like his analogous right of stoppage *in transitu*, owe their origin neither to the common law nor to equity, but to the custom of merchants.”

must have expired, or the buyer must have become insolvent.¹

1. *The Unpaid Seller*. — His right “in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer’s part, and, until he makes such payment or tender, he has no right to the possession.”² As this right is accorded to the seller by law, in order that he may obtain the purchase-price of his goods before parting with them, it continues (unless voluntarily relinquished) until the entire price is paid or tendered. If a portion of the goods has been delivered, the lien for whatever is unpaid attaches to whatever portion is still in the vendor’s possession.³

If negotiable paper has been taken as conditional payment, “and the condition on which it was received has not been fulfilled,”⁴ the seller is deemed unpaid, and is entitled to assert his lien.⁵ On the other hand, the unpaid seller’s lien is confined to the price of the goods, and does not warrant him in holding them to secure any other claim due to him from the buyer,⁶ nor does it

¹ Sale of Goods Act, § 41.

² *Bloxam v. Sanders*, 4 B. & C. 941, 948 (1825).

³ *Ware River Co. v. Vibbard*, 114 Mass. 447, 458 (1874). “It attaches to whatever part of the property may remain within the control of the seller, for the whole amount of purchase-money of the same sale remaining due, payable, and unpaid.” *Miles v. Gorton*, 2 Cr. & M. 504, 512 (1834).

⁴ Sale of Goods Act, § 38.

⁵ *Gunn v. Bolekow*, L. R. 10 Ch. App. 491, 501 (1875). “If the bill is dishonored before delivery, then the vendor’s lien revives; or if the purchaser becomes openly insolvent before delivery actually takes place, then the law does not compel the vendor to deliver to an insolvent purchaser.”

⁶ *Somes v. British Co.*, 8 H. L. C. 338, 345. “No person has by law a right to add to his lien upon a chattel a charge for keeping it

survive absolute payment or a valid tender of the entire price.¹

(a) *Lien accorded to Quasi Vendors.* — With such favor does the law look upon the rights of one whose money has paid for goods, that it accords a seller's lien to "any one whose position can be shown to be substantially analogous to that of an ordinary seller."² Hence, a factor who has paid, or become directly responsible for goods ordered by his principal, has the rights against the goods of an unpaid vendor,³ although in other respects his rights and liabilities may be those of an agent.⁴

The rights of an unpaid seller have been adjudged to one who had bought and resold a part of a larger mass (1,442½ bags of beans out of 3,932 bags), although this part had not been separated from the bulk so as to pass title to specific goods;⁵ and to a banker who had purchased drafts payable to the order of a customer who had not paid for them, nor obtained possession.⁶ A surety for the buyer has not the rights of an unpaid vendor,⁷ unless they are conferred by statute.⁸

2. *Seller in Possession.* — The courts are disposed to give a broad meaning to the term "possession" in connection with the debt is paid; that is, in truth a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession."

¹ *Martindale v. Smith*, 1 Q. B. 389 (1841).

² *Chalmers' Sale of Goods Act* (2d ed.), 71.

³ *Ex parte Banner*, 2 Ch. D. 278, 287 (1876). "The right of an agent in such a case over the goods, as against his principal, is the same as that of a vendor as against a purchaser." *Gossler v. Schepler*, 5 Daly (N. Y.), 476, 479 (1875). "He may retain the *jus disponendi*." *Moors v. Kidder*, 106 N. Y. 32, 40 (1887).

⁴ *Cassaboglou v. Gibb*, 11 Q. B. D. 797 (1883).

⁵ *Jenkyns v. Osborne*, 7 M. & G. 678 (1844).

⁶ *Muller v. Pondir*, 55 N. Y. 325, 339 (1873).

⁷ *Skiffen v. Wray*, 6 East, 371 (1805).

⁸ *Imp. Bank v. London Co.*, 5 Ch. D. 195 (1877).

tion with the unpaid seller's lien. Although the purchaser has received a part of the goods, and has taken samples of the remainder, the vendor remains in possession of the residue, unless the delivery of the part was made with intent that it should operate as a delivery of the whole.¹ Nor does it alter the case that the buyer is to pay the seller warehouse charges while the latter retains control of the goods.² Indeed, it has been judicially declared that "the vendor's lien is not divested by any species of constructive delivery, so long as he retains actual custody of the goods either by himself or by his own agent or servant."³

This view has secured legislative approval in Britain.⁴ If the seller actually delivers the goods to the buyer under the expectation of immediate payment, and payment is not made, his lien is not affected: he may retake and hold them until he receives full payment.⁵ But the lien is lost in case the buyer or his agent lawfully obtains possession,⁶ even though that possession is defeasible by reason of fraudulent representations as to his credit made by the purchaser. The fraud may enable the seller to rescind the contract and retake the goods as his own; but if he does not rescind the sale, both the title and the possession will remain in the vendee, and "after sale and delivery of personal property the law implies no lien for purchase-money."⁷

3. *Lien waived: Sale on Credit.* — While the law recognizes and secures the rights of an unpaid vendor, it

¹ Dixon v. Yates, 5 B. & Ad. 313, 341 (1833).

² Bloxam v. Sanders, 4 B. & C. 941 (1825).

³ Conrad v. Fisher, 37 Mo. App. 352, 386 (1889), and cases cited.

⁴ Sale of Goods Act, § 41 (2).

⁵ Owens v. Weedman, 82 Ill. 409 (1876).

⁶ Bill of Sale Act, § 43 (1) (b).

⁷ Johnson v. Farnum, 56 Ga. 144 (1876).

does not compel him to stand upon those rights. He is at liberty to bargain them away or to waive them. If, instead of insisting upon payment as a condition precedent to the buyer's obtaining possession of the goods, he takes the latter's promise to pay at a future time,¹ or receives some security in the place of cash,² such as the guaranty of a third person for the payment of the price,³ he waives his lien, unless by a trade usage⁴ or by express stipulation⁵ it is retained. If he transfers possession of the goods to the buyer, before payment, although they remain upon his premises, his lien may be lost; as where the vendor of timber allowed the buyer to cut and prepare it for market.⁶

(a) *Revival of Lien upon Expiration of Credit.* — While a sale on credit operates as a waiver of the unpaid seller's lien, during the term of credit, the lien revives upon the expiration of that term, provided the goods have not passed meantime from the seller's possession and control. Thereafter, "the buyer cannot claim to take the goods from the seller, without first paying the price."⁷

(b) *Revival of Lien upon Buyer's Insolvency.* — If the buyer becomes insolvent during the term of credit, the lien immediately revives, for the seller's waiver of his lien is not absolute when he gives the buyer credit, instead of demanding cash; the law, still having regard for the superior

¹ *Arnold v. Delano*, 4 Cush. (58 Mass.) 33, 39 (1849).

² *In re Leith's Estate*, L. R. 1 P. C. 296, 305 (1866).

³ *Dummer v. Smedley*, Mich. ; 68 N. W. 260 (1896).

⁴ *Field v. Lelean*, 6 H. & N. 617; 30 L. J. Ex. 168 (1861).

⁵ *Gregory v. Morris*, 96 U. S. 619 (1877).

⁶ *Douglas v. Shumway*, 13 Gray (79 Mass.), 498, 502 (1859). "We know of no case where such a right has been recognized, after the vendee has, at his own expense, in pursuance of the contract of sale, changed the character of the property, and by his own labor and money added to its value. By these acts the vendor must be deemed to have parted with his possession and control of the property."

⁷ *White v. Welsh*, 32 Pa. St. 396, 400 (1861).

equities of an unpaid seller, treats the waiver as made upon an implied condition that the buyer shall keep his credit good.¹ Nor does it matter that the buyer was in fact insolvent when the agreement for credit was made, provided that seller did not know of the insolvency.²

If a part of the goods has been delivered, and the insolvent has not paid for them, the seller may withhold the remainder until "he is paid the debt due for those already delivered, as well as the price of those still to be delivered ;"³ but "the insolvency of one party to a contract does not release the other from its obligations, provided, always, the consideration promised if money be paid, or if the consideration be the note or other obligation of the insolvent, money be tendered in its place."⁴

4. *Effect on Lien of Transfer of Buyer's Interest.* — So long as the unpaid vendor's lien attaches to the goods as against the vendee, it cannot be affected by any disposition of the latter's interest in them, without the vendor's assent.⁵ This follows from the general principle of law, which has been referred to so often, "that a man who has not the property and right of possession in goods cannot transfer them to a vendee." Even a *bona fide* purchaser, therefore, from a vendee must take the goods subject to the unpaid vendor's lien,⁶ unless the latter has estopped himself from asserting it as against such purchaser,⁷ or has

¹ Arnold v. Delano, 4 Cush. 33, 39.

² Crummev v. Randenbush, 55 Minn. 426 ; 56 N. W. 1113 (1893). "Insolvency as applied to this branch of the law means a general inability to pay one's debts or to meet one's financial engagements. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property."

³ *Ex parte* Chalmers, L. R. 8 Ch. App. 289, 291 (1873).

⁴ Florence Mining Co. v. Brown, 124 U. S. 385, 389 (1887).

⁵ Dixon v. Yates, 5 B. & Ad. 313, 339 (1833).

⁶ Keeler v. Goodwin, 111 Mass. 490, 492 (1873) ; Palmer v. Hand, 13 Johns. (N. Y.) 434 (1816).

⁷ Farmeloe v. Bain, 1 C. P. D. 445 (1876).

clothed his immediate vendee with statutory reputed ownership under the Factors Act or similar legislation.¹

§ 5. The Seller's Right of Stoppage in Transitu.

This, like the right of lien, is conferred by the law upon the unpaid seller. Like the right of lien, too, it "is not founded on any contract between the parties; it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop *in transitu* was originally proved in evidence as part of the custom of merchants; but it has been afterwards adopted as a matter of principle, both at law and in equity."²

(a) *How this Right differs from that of Lien.*— While it is analogous to the right of lien, and like that has its origin in the custom of merchants, the two are not to be "regarded as the same right exercised under different circumstances," although judicial dicta that they should be so regarded are numerous.³ They differ in two important respects.

The right of lien, as we have discovered, is not available, unless the seller is in possession of the goods, in the character of an unpaid former owner or of bailee to the buyer. It is determined as soon as the buyer or his agent lawfully obtains possession. The right of stoppage *in transitu*, on the other hand, does not come into existence until the seller's lien has terminated; that is, until the goods have passed out of the vendor's possession into the hands of a carrier for transmission to the vendee.⁴

Again, we have seen that the seller's lien reattaches, upon the expiration of the term of credit, whether the buyer is insolvent or not. But the right of stoppage *in*

¹ Voorhis v. Olmstead, 66 N. Y. 113 (1876).

² Kendall v. Marshall, 11 Q. B. D. 356, 364 (1883).

³ Conrad v. Fisher, 37 Mo. App. 352, 384, and cases cited (1889).

⁴ Chalmers' Sale of Goods Act (2d ed.), 72.

transitu can be exercised in case of insolvency only. "It is a privilege allowed to the seller, for the particular purpose of protecting him against the insolvency of the consignee."¹

(b) *It differs from Vendor's Right to retake his own Goods.*—In some of the cases this right is confounded with the right of the owner to retake goods, or to vary their consignment, when he has reserved to himself the *jus disponendi*, or when for some other reason title has not passed.² But the two are wholly distinct. A man can no more have the right to the technical stoppage of his own property in transit than he can have the right of lien on it. If the vendor has appropriated the goods unconditionally to the contract, and title has vested in the vendee, he cannot vary their consignment;³ but he may exercise the right of stoppage *in transitu*.

Let us now consider the conditions upon which this right is exercisable.

1. *The Unpaid Seller.*—Upon this point it is not necessary to add much to the statements made when discussing the seller's lien.⁴ "Any person who is in the position of a seller," although for most purposes his relation to the buyer may be that of agent to principal, may be entitled to stop goods for which he has paid or has directly pledged his credit.⁵

Accordingly, a factor who has purchased goods and paid or become personally liable therefor, although this is done pursuant to an order from his principal, and although he

¹ The *Constantia*, 6 Rob. 320, 326 (1807).

² *Hawes v. Watson*, 2 B. & C. 540 (1824); *Shanwick v. Sothern*, 9 Ad. & E. 895 (1839); *Scholfield v. Bell*, 14 Mass. 40 (1817). See note to *Stoveld v. Hughes*, 12 Rev. Rep. at p. 525.

³ *Phil. Ry. v. Wireman*, 88 Pa. St. 265 (1879); The *Constantia*, *supra*.

⁴ *Clark v. Mauran*, 3 Paige (N. Y.), 373 (1832). One who ships goods in payment of a debt due the consignee is not an unpaid seller, and has no right to stop them *in transitu*.

⁵ Sale of Goods Act, § 38 (2).

has consigned them to the principal as the latter's goods, and has received the principal's negotiable paper in conditional payment for the price, occupies substantially the position of a vendor, and may stop the goods while in transit, upon the principal's insolvency.¹ An agent of the consignor, to whom the bill of lading has been indorsed by his principal, and who has become vested thereby with the mercantile title to the goods, may exercise the right of stoppage in his own name.²

(a) *Right may be exercised by Agent.* — Of course, the unpaid vendor may exercise the right by an agent, as well as in person. Nor does it matter that the agent has not received special authority to stop the goods in question, if his exercise of the right on behalf of his principal is within the scope of his general authority.³ Even a stranger may stop the goods for the unpaid vendor, provided the latter ratifies the act, before the buyer or his transferee obtains possession or makes demand for them.⁴

(b) *Factors who are not Unpaid Vendors.* — While the term "unpaid vendor" has in law a broad signification, it does not include a person who has never occupied substantially the position of owner or holder of the mercantile title. A factor who has accepted bills drawn on him by the consignor, on the strength of the latter's promise to ship certain goods, cannot claim them in the character of owner;⁵ nor can a factor maintain such a claim who has had the goods in possession, even though they were subject to a lien in his favor for advances during his possession, but who has delivered them to a carrier for transportation to his principal's vendee.⁶

¹ Feize v. Wray, 3 East, 93 (1802); Newhall v. Vargas, 13 Me. 93 (1836).

² Morison v. Gray, 2 Bing. 260 (1824).

³ Reynolds v. Railroad, 43 N. H. 580 (1862).

⁴ Durgy Cement Co. v. O'Brien, 123 Mass. 12 (1877).

⁵ Kinloch v. Craig, 3 D. & E. 783 (1790).

⁶ Gwyn v. Railway, 85 N. C. 429 (1881).

2. *The Buyer's Insolvency.* — It is only in cases of insolvency of the buyer that the unpaid vendor's right of stoppage *in transitu* is available. Here, as in the case of the vendor's lien, insolvency is not used in a narrow and technical sense; it is not confined to a buyer who has been adjudged a bankrupt or an insolvent in due legal proceedings, nor to one who has made an assignment for the benefit of his creditors. It includes every one who cannot pay his debts as they come due in the ordinary course of business.¹

If the buyer has "by his conduct in business afforded the ordinary apparent evidence of insolvency;"² if he has permitted his commercial paper to be dishonored or his property to be attached in an action which he allows to go to judgment by default,³ or if he has admitted that he is financially "embarrassed and not able to make full or general payment of his debts,"⁴ or, although he has not actually failed nor has his paper gone to protest, yet if it is clear that he is hopelessly insolvent and will be unable to pay for the goods when the price falls due,⁵ he cannot be heard to say, as against the unpaid vendor, that he is not insolvent. Were the seller obliged in such cases to let the goods go into the actual possession of the buyer, they would be appropriated to the payment of debts due to others, while he remained unpaid.⁶

¹ Sale of Goods Act, § 62 (3); *Jeffries v. Fitchburg Co.*, 93 Wis. ; 67 N. W. 424, 426 (1896).

² *Diem v. Kobletz*, 49 Ohio St. 41, 51; 29 N. E. 1124 (1892); *cf. Ex parte Carnforth*, 4 Ch. D. 108, 122 (1876). "An inability to pay avowed either in act or in word."

³ *Tuthill v. Skidmore*, 124 N. Y. 148; 26 N. E. 348 (1891). The mere levy of an attachment is not evidence of the defendant's insolvency. *Gustine v. Phillips*, 38 Mich. 674 (1878).

⁴ *Secomb v. Nult*, 14 B. Mon. (Ky.) 324, 326 (1853).

⁵ *Bloomington v. Memphis Ry.*, 6 Lea (Tenn.), 616 (1881).

⁶ *Rogers v. Thomas*, 20 Conn. 53 (1849), holding that the term

(a) *Buyer Insolvent when Goods despatched.* — That the buyer was insolvent at the time of despatching the goods, or even at the date of the sale contract, will not affect the seller's right of stoppage, nor will the fact that no radical change in the financial circumstances of the buyer has occurred intermediate the sale and the stoppage,¹ unless the seller knew of the insolvency when he despatched the goods.² In the latter case, he voluntarily surrenders a right which the law confers upon him, but does not force him to exercise.

3. *The Transit: (a) its Inception.* — Until the goods have passed from the vendor's possession, the vendor's right of lien continues and the right of stoppage cannot arise. It comes into existence with their delivery to a bailee as the buyer's property for the purpose of transmission to the buyer. As soon as the bailee obtains possession the right may be exercised, although he has not set them in motion on their journey.³ Their transit has begun, and it continues, as we shall see, so long as they remain "in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them,"⁴ whether such person "be a carrier, a warehouse-keeper, a wharfinger,

"insolvency," in this connection, does not mean a general inability of the buyer to pay his debts, but that he has taken the benefit of an insolvent law, or has stopped payment, or has done some open, notorious act making a visible change in his pecuniary situation, seems to be followed in that State (*Millard v. Webster*, 54 Conn. 415, at p. 417), but in no other jurisdiction.

¹ *Loeb v. Peters*, 63 Ala. 243 (1879).

² *Garden Cultivator Co. v. Missouri Railway*, 64 Mo. App. 305 (1895); *H. & T. Ry. v. Poole*, 63 Tex. 246 (1885).

³ *Wiseman v. Vandeputt*, 2 Vern. 203 (1690). The ship, on which the goods had been loaded, had not left her dock.

⁴ *Schotsman v. Lancashire Ry.*, L. R. 2 Ch. App. 332, 338 (1867).

packer, or other depositary, or an agent for the purpose of forwarding.”¹

The carrier or custodian must be a middleman, however, between the unpaid seller and his vendee. Hence, if the seller voluntarily ships the goods to a purchaser from his vendee, the carrier is not a middleman intervening between the original seller and buyer; the title and possession have been passed to the first purchaser, and the transit is from him to the second vendee. The goods have never been put in transit between the original seller and buyer, and the former has no right of stoppage *in transitu*, although the buyer becomes insolvent while the goods are on their journey to the sub-purchaser.²

Such middleman may be the buyer's agent for certain purposes, and yet, if by the agreement of the parties or by usage of trade, he is not a mere servant of the buyer, but is a person interposed between the seller and buyer,³ having a possession of his own and liable, in his capacity as bailee, to an action by the buyer, in case the goods are carelessly lost or misdelivered,⁴ the goods are still in transit. The middleman may have authority from the buyer “to accept delivery so as to pass the property,”⁵ or he may have given a bill of lading for the goods to the buyer subsequent to their delivery by the seller,⁶ and still the goods be in transit and subject to stoppage. On the other hand, if goods are delivered to a master of a ship owned by the buyer, pursuant to the latter's directions, and the

¹ Harris v. Pratt, 17 N. Y. 249, 252 (1858).

² Treadwell v. Aydlett, 9 Heisk. (Tenn.), 388 (1872).

³ Bolin v. Huffnagle, 1 Rawle (Pa.), 9, 22 (1828); Berndtson v. Strang, L. R. 4 Eq. 481 (1867); cf. Newhall v. Vargas, 13 Me. 93 (1836).

⁴ Berndtson v. Strang, 3 Ch. App. 588, 591 (1868).

⁵ Bethell v. Clark, 20 Q. B. D. 615 (1888).

⁶ Lyons v. Hoffnung, 15 App. Cas. 391 (1890).

circumstances show that this ship is their final destination as between seller and buyer, such master is not a middleman and the right of stoppage has been surrendered.¹

(b) *Interception of Transit by Attornment.* — If the middleman attorns to the buyer before the goods reach their final destination, as where a railway company agrees with the buyer to hold the goods as warehouseman for him, the right of stoppage is lost.² But this attornment does not take place by a new agreement between the carrier and buyer “for the purpose of expediting them to the place of original destination.” It must be “a new agreement . . . to hold the goods for the consignee as his agent . . . in a new character, for the purpose of custody, on his account and subject to some new or further order to be given to him.”³ And when the court is asked to find that such a contract has been made, the fact that the carrier has not been paid his freight charges,⁴ or that he has not waived his lien therefor,⁵ indicates that no such contract has been made.⁶

(c) *Interception by Sole Act of Buyer.* — While mutual assent of the carrier and consignee is necessary to attornment,⁷ it is not indispensable to such possession by the

¹ Van Casteel v. Booker, 2 Ex. 691 (1848).

² Kendall v. Marshall, 11 Q. B. D. 356 (1883).

³ Whitehead v. Anderson, 9 M. & W. 518, 535 (1842); Lyons v. Hoffnung, *supra*; Langstaff v. Stix, 64 Miss. 171 (1886).

⁴ Kemp v. Falk, 7 App. Cas. 573, 584 (1882); Jeffris v. Fitchburg Co., 93 Wis. ; 67 N. W. 424, 427 (1896).

⁵ Farrell v. Railroad, 102 N. C. 390, 403; 9 S. E. 302 (1889).

⁶ Sale of Goods Act, § 45 (3). This sub-section appears not to permit attornment until “after the arrival of the goods at the destination appointed” by the contract of sale. From the cases in England and in this country, it appears that attornment is rarely attempted before such arrival.

⁷ James v. Griffin, 2 M. & W. 623 (1837); *cf.* Guilford v. Smith, 30 Vt. 49 (1858).

consignee as will terminate the seller's right of stoppage. If the consignee tenders performance of his obligations, and rightfully demands the goods, the wrongful refusal of the carrier to deliver them will not operate to keep them in transit.¹ Indeed, it is settled in England that if the consignee obtains actual possession of the goods, even by a forcible or a fraudulent interception, and before they have reached their final destination, the transit is at an end.² Such taking, it is said, if not assented to by the carrier, "may be a wrong to him for which he would have a right of action," but it ends the transit.³ In this country there is authority for the view that the buyer cannot destroy the seller's right of stoppage, by fraudulently intercepting them during their transit to their original destination; and if the interception is resorted to for the sole purpose of preventing the seller's exercise of this right.⁴

(d) *Interception by Creditors of Buyer.* — The unpaid seller's right of stoppage *in transitu* is not affected by a seizure of the goods during their transit, under legal process on behalf of the buyer's creditors. They could have no better right to the goods than the buyer had, and his title, at the moment of seizure, was subject to the seller's right to stop the goods. This right is not simply a lien,⁵ but a property right in the goods, and it cannot be divested by attachment or execution.⁶ Such "process does not

¹ *Bird v. Brown*, 4 Ex. 786, 797 (1850).

² Sale of Goods Act, § 45 (2).

³ *Whitehead v. Anderson*, 9 M. & W. 518, 534 (1842).

⁴ *Poole v. The H. Ry.*, 58 Tex. 134 (1882).

⁵ *Smith v. Goss*, 1 Camp. 282 (1808). Lord Ellenborough is reported as saying in his charge to the jury, "The vendor's power of intercepting the goods was the elder and preferable lien," but see the authorities in the next three notes, and *Inslee v. Lane*, 57 N. H. 454, 458 (1876). "The essential ground of the right of lien is possession; that of stoppage *in transitu* is non-delivery to the vendee."

⁶ *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270, 279 (1854).

proceed on the ground of defeating a prior right in a third person, but on the ground of acquiring such interest in the property attached as the debtor had himself. If the levy of an execution, or the service of an attachment against the vendee, were allowed to defeat the claim of the vendor, the right of stoppage *in transitu* would be of little value; for judgments and attachments not infrequently furnish the first public evidence of the insolvency of a trader.”¹ Nor will the vendor’s right be destroyed, though the officer levying the process take the goods to the vendee’s place of business.²

(e) *Interception by Transferee of Buyer.* — A sale of the goods by the purchaser, during their transit, does not divest the original seller’s right of stoppage, although the second purchaser may be ignorant of the first seller’s right, and may pay full value for the goods.³ The original purchaser can pass no better title than he had, and this is subject to the seller’s property interest known as the right of stoppage *in transitu*.⁴ But this right may be waived, and if the original seller assents to the resale, the second purchaser may obtain a perfect title.

The evidence of such assent, however, must be something more than a failure to express dissent upon receiving information that a sub-sale has been made.⁵ It must show a voluntary abandonment of the original seller’s right,⁶ or

¹ *Buckley v. Furniss*, 15 Wend. 137, 144 (1836).

² *Sherman v. Ruger*, 55 Wis. 346 (1882).

³ *Craven v. Ryder*, 6 Taunt. 433 (1816); *Pattison v. Culton*, 33 Ind. 240 (1870).

⁴ *Holbrook v. Vose*, 6 Bosworth (N. Y.), 76, 107 (1860).

⁵ *Robinson v. Morgan*, 65 Vt. 37; 25 At. 899 (1893).

⁶ *Stoveld v. Hughes*, 14 East, 308, 317 (1811). Opinion of Bayley, J. : “It is the law of England, and I think of Scotland also, that if a seller has received intimation of a sub-sale, and has assented thereto, that deprives him of all right to retain as against the original purchaser.”

it must disclose conduct on his part which fairly induced the second buyer to change his position for the worse.¹ For example, an unpaid vendor who shows the goods to one negotiating for their purchase from the first vendee, as the property of the latter, without any intimation that he has any claim upon them as vendor, is estopped from setting up such claim against the *bona fide* second purchaser.² On the other hand, the failure of the vendor to give notice of his claim to one negotiating with the first vendee for a repurchase, or even the delivery of a portion of the goods to the second purchaser upon an order from the first buyer, will not affect the original vendor's right against the goods not delivered.³ It is undoubtedly true, however, that in case of "a sub-sale, with the privity of the original vendor, the abandonment by the latter of his lien in favor of the sub-vendee will be presumed more easily than it would have been in regard to the first vendee."⁴

(f) *Transferee of Bill of Lading*.—If the seller delivers to the buyer a bill of lading of the goods, he enables the latter to bestow upon a transferee a better title than the buyer had.⁵ By this document he authorizes the carrier to deliver the goods either to the buyer or his assigns; and, as the document is by the law merchant *quasi negotiable*, and as its delivery to a purchaser⁶ is the

Lord Young in *Fleming v. Smith*, 8 Sess. Cas. (4th series) at p. 552 (1881).

¹ *Merchant Banking Co. v. Phoenix Co.*, 5 Ch. D. 205 (1875).

² *Hunn v. Bowne*, 2 Caines Cas. (N. Y.) 38 (1804). See dissenting opinion of Kent, J., 44, 45.

³ *Hamburger v. Rodman*, 9 Daly (N. Y.), 93 (1880).

⁴ *Campbell on Sales* (2d ed.), 303.

⁵ *Sale of Goods Act*, § 47.

⁶ *Patten v. Thompson*, 5 M. & S. 350 (1816). Its delivery to the first buyer, or by him to his factor, is not equivalent to a delivery of possession of the goods. See *Blackburn on Sales* (2d ed.), 402, 403.

legal equivalent of the actual delivery of the goods, a sub-purchaser of an interest in the goods, who receives from the original buyer a transfer of the bill of lading, is in a position to say that the original seller has assented in advance to such sub-sale, and to the transfer of the legal possession of the goods. Accordingly, "it has always since *Lickbarrow v. Mason*¹ been considered as settled law that a *bona fide* purchaser of an interest in goods by taking an assignment of a bill of lading in furtherance of that purchase renders his interest indefeasible by the consignor's stoppage *in transitu*."² In jurisdictions where delivery orders, warehouse receipts, or like instruments are treated as documents of title, the right of stoppage *in transitu* may be cut off by their transfer in furtherance of a purchase from the original buyer.³

(g) *Bill of Lading must be transferred for Value.*— It will be observed that not every transfer of a bill of lading defeats the right of stoppage *in transitu*. In order to have that effect, it must be made for value to a *bona fide* purchaser. An assignee of the buyer for the benefit of creditors pays no value for the transfer of a bill of lading from his assignor, and consequently cannot take the goods freed from the original seller's right of stoppage, even though both assignor and assignee believed that the original seller had been fully paid.⁴ In England and in many American jurisdictions an antecedent debt is considered to constitute value;⁵ but many courts have held that one who has received a bill of lading as collateral security only for an old debt

¹ 5 D. & E. 683, and 6 East, 21 n.

² Blackburn on Sales (2d ed.), 398.

³ Sale of Goods Act, § 47.

⁴ *Stanton v. Eager*, 16 Pick. 467 (1835).

⁵ *Leask v. Scott*, 2 Q. B. D. 376; *Lee v. Kimball*, 45 Me. 172 (1858).

is not a purchaser for value within the rule now under consideration.¹

(h) *Bill of Lading must be transferred in Good Faith.* — The transferee of a bill of lading must not only be a purchaser for value, in order to hold the goods freed from the seller's right of stoppage, but his purchase must have been made in good faith. If he buys with knowledge that the first purchaser is insolvent, and that the transfer will result in diverting the goods or their proceeds from the unpaid seller to other creditors of the purchaser, and especially if he interpose, "in order to assist the buyer to disappoint the just rights and expectations of the seller," he will not be treated as a *bona fide* purchaser. On the other hand, his knowledge that the goods have not been paid for will not prevent his taking a transfer of the bill of lading in good faith. Such a circumstance does not indicate that the bill is not fairly and honestly assignable.² Nor does the simple fact that the bill of lading, which the original vendee offers for sale, is marked "duplicate," render the assignee thereof a transferee in bad faith.³

If, however, the "original" bill has been sent to the purchaser, attached to a draft for the purchase-price, so that title has been reserved in the seller, the transmission to the purchaser of the "duplicate" bill will not operate to pass title to him. A transferee of the "duplicate" bill from such a purchaser, it has been held, is bound to inquire "what disposition has been made of the original bill of lading;" and if he takes it without inquiry, he takes it

¹ *Lesassier v. The Southwestern*, 2 Woods (U. S. Cir. Ct.), 35 (1874); *Loeb v. Peters*, 63 Ala. 243 (1879).

² *Cumming v. Brown*, 9 East, 506, 514, 516 (1808); *Loeb v. Peters*, *supra*; *Chandler v. Fulton*, 10 Tex. 2 (1853); *Rosenthal v. Dessau*, 11 Hun (N. Y.), 49 (1877).

³ *Missouri Ry. v. Heidenheimer*, 82 Tex. 195; 17 S. W. 608 (1891).

subject to all the defects which that inquiry would have disclosed.¹

(i) *When Bill of Lading is transferred as Security.* — But a bill of lading may be transferred by the first purchaser, not pursuant to an absolute sale of the goods to a second purchaser, but to a third person by way of a mortgage or pledge. In such a case, if the transferee is a holder of the bill for value and in good faith, the original seller will not be able to take the goods out of his hands. By the transfer of the bill of lading the legal property in the goods, as well as the right to their possession, has been vested in the third person. It does not follow from this, however, that the seller's right of stoppage has been totally defeated. The transfer having been made as a mortgage or as a pledge, and not as a sale, to the third person, whatever interest in the goods remains in the first purchaser is still available to the unpaid vendor. Upon due notice of stoppage, he will "be considered as having resumed his former interest in the goods, subject to that pledge or mortgage."²

In order to enforce his right, however, he must proceed in equity,³ or he must discharge the debt secured by the transfer.⁴ If he pursues the former method, the court will be able to compel the transferee to have recourse to other property of the transferor, which he may hold as security for the debt, before resorting to the goods covered by the bill of lading.⁵

(j) *Absolute Transfer of Bill of Lading, with Subpurchase Price unpaid.* — Even though the transfer be

¹ *Castanolle v. Missouri Ry.*, 24 Fed. 267 (1885), and note by Adelbert Hamilton.

² *Matter of Westzinthus*, 5 B. & Ad. 817 (1833).

³ *Spalding v. Ruding*, 6 Beav. 376 (1843).

⁴ *Missouri Pac Ry. v. Heidenheimer*, 82 Tex. 195; 17 S. W. 608 (1891).

⁵ *Matter of Westzinthus*, *supra*.

absolute, if the transferee has not paid the purchase-price to the first buyer, such unpaid price may be subjected in equity to the original seller's right of stoppage.¹ A like result has been reached where the goods have been sold by judicial order during their transit, and the proceeds paid into court.² On the other hand, if the original buyer takes out a policy of insurance on the goods, this will not enure to the benefit of the seller. The insurance company is not a sub-purchaser of the goods which are lost or damaged during transit. "There is no contract or agreement which entitles the vendor to go beyond the goods in the state in which they arrive, and to claim some moneys, which have been paid by the underwriters to the purchasers of the goods in respect of their loss by the non-arrival of their property."³

(k) *The Termination of the Transit.*—If the transit has not been intercepted in one of the ways which we have been considering, the next important question is, Has the transit terminated? "That," as a distinguished judge has said, "is always an exceedingly difficult question, and before we can apply the law we must see what are the facts, and what is the business view of the transaction."⁴

We ought not to be surprised, therefore, to find different courts reaching opposite conclusions in cases which appear strikingly similar. A careful comparison of such

¹ *Ex parte* Golding, Davis & Co., 13 Ch. D. 628 (1880). The doctrine of this case has been criticised (Chalmers' Sale of Goods (2d ed.), 87), but the critics have not answered Lord Bramwell's question, "What difference is there in principle between the case of a man selling goods on credit for £500, and these being then resold for £600, and the case of the purchaser pledging the goods for £600, with a right of sale by the pledgee?" *Ex parte* Falk, 14 Ch. D. 446, 457 (1880).

² *Hause v. Judson*, 4 Dana (Ky.), 7, 13 (1836).

³ *Berndtson v. Strang*, L. R. 3 Ch. App. 588, 591 (1868).

⁴ *Ex parte* Miles, 15 Q. B. D. 39, 43 (1884).

decisions will show that the disagreement is due, not to conflicting views of the law, but to divergent inferences from the facts. In truth, the legal principles involved are simple and well established. They have never been stated more clearly and concisely than by Lord Esher, in the following passage from a recent decision:¹ “The doctrine of stoppage *in transitu* has always been construed favorably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser’s agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu*, and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: when the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but if the goods are not in the hands of a carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards, in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit.”

¹ Bethell v. Clark, 20 Q. B. D. 615 (1888).

Applying the foregoing principles to the case then before the court, it was decided that, although the contract of sale did not designate the transit, the subsequent directions given by the vendees to the vendors, to consign the goods "to the Darling Downs, to Melbourne, loading in the East India docks," defined the original transit as extending from the seller's place of business to Melbourne.

On the other hand, if merchants in New York order goods from merchants in Berlin, Germany, but direct that they shall be sent to the vendees' agents at Bremen "at our" (the vendees') "disposition," the original transit ends with their delivery to the Bremen agents.¹

(1) *Transit continues until the Goods come to Buyer's Possession.* — It is to be borne in mind that the goods are in transit, so long as they are in the hands of a middleman on their way from the vendor to the vendee. They may have reached the port or the station to which they were consigned, but unless they have been delivered to the purchaser, they are still *in transitu*.² Even "the unloading of the goods and the placing of them in the warehouse of the railroad company does not necessarily terminate the transitus, nor put an end to the right of stoppage; so long as they remain in the hands of the carrier or middleman as such, the right does not cease."³ "This right continues not only while the goods are in actual transit, but until they have reached their destination and are delivered into the actual or constructive possession of the consignee."⁴

Undoubtedly, by a previous course of dealing or by ex-

¹ *Becker v. Hallgarten*, 86 N. Y. 167 (1881); *Brooke Iron Co. v. O'Brien*, 135 Mass. 442 (1883).

² *Kemp v. Falk*, 7 App. Cas. 573, 588 (1882); *McFetridge v. Piper*, 40 Ia. 627 (1875).

³ *Synms v. Schotten*, 35 Kans. 316, 313, 314; 10 Pac. 828 (1886).

⁴ *Harris v. Tenney*, 85 Tex. 254, 258; 20 S. W. 68 (1892).

press agreement, the carrier and purchaser may treat a deposit of the goods at a particular place as a delivery to the purchaser and an end of the transit.¹ On the other hand, if the purchaser refuses to take delivery of the goods, when they reach their original destination,² although without just excuse, the transit continues.³ If his refusal is due to his unwillingness to defeat the vendor's right of stoppage, the courts will not only treat it as preventing a delivery, but will applaud the actor.⁴

(m) *Deposit of Goods in Bonded Warehouse.*— Goods, upon their arrival at a particular port or station, are often deposited in a government warehouse, subject to revenue dues, instead of being delivered at the buyer's place of business. Whether such a deposit determines the right of stoppage *in transitu* depends upon whether it marks the completion of the vendor's obligation of delivery. If they are deposited in the name of the seller, and are awaiting further transportation to be directed by him, the right of stoppage continues.⁵ The same result follows if they are deposited by government officers, and the buyer cannot show authority from the seller to have them deposited as his property.⁶ But if they are rightfully deposited by or on behalf of the buyer, after a

¹ *Sawyer v. Joslin*, 20 Vt. 172 (1848); *Hall v. Dimond*, 63 N. H. 565; 3 At. 423 (1885).

² In *Ex parte Miles*, 15 Q. B. D. 39, 43, the Master of Rolls declared, "destination means sending the goods to a particular person who is to receive them, and not sending them to a particular place without saying to whom."

³ *Bolton v. Railway*, L. R. 1 C. P. 430, 440 (1866); *Greve v. Dunham*, 60 Ia. 108; 14 N. W. 130 (1882).

⁴ *Mason v. Wilson*, 43 Ark. 172, 177 (1884); *Tufts v. Sylvester*, 79 Me. 213; 9 At. 357 (1887); *Kingman v. Denison*, 84 Mich. 608; 48 N. W. 26 (1891). See *Millard v. Webster*, 54 Conn. 415 (1887), *contra*.

⁵ *Mohr v. Boston Railway*, 106 Mass. 67 (1870).

⁶ *Donath v. Broomhead*, 7 Pa. St. 301 (1847).

delivery to him, although the delivery is subject to the government restraint that he shall not take them away until the revenue dues are paid, the transit is at end and the right of stoppage is determined.¹

4. *Exercising the Right of Stoppage.* — As the right is greatly favored by the courts, they have never required the vendor to adopt any particular form of procedure in exercising it. He may accomplish his purpose by taking actual possession of the goods,² or by changing their consignment,³ or by giving notice of his claim to the carrier or other bailee in possession.⁴ His notice of claim need not state his reason for stopping the goods, nor refer to the facts on which the claim rests.⁵ Nor is it necessary that it contain “an express demand to redeliver the goods. . . . If the carrier is clearly informed that it is the intention and desire of the vendor to exercise his right of stoppage *in transitu*, the notice is sufficient.”⁶

(a) *Notice to Others than Carrier.* — The notice may be effectively given to an officer who has taken the goods from the carrier under process against the buyer,⁷ or to the principal of the person who is conveying them. “In the latter case, the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.”⁸

¹ *Cartwright v. Wilmerding*, 24 N. Y. 521, 536 (1862); *Lewis v. Mason*, 36 Up. Can. Q. B. 590 (1875); *Wiley v. Smith*, 2 Duval (Can.), 1 (1877).

² Sale of Goods Act, § 46 (1).

³ *Wiseman v. Vandeputt*, 2 Vern. 203 (1690).

⁴ *Litt v. Cowley*, 7 Taunt. 169 (1816).

⁵ *Allen v. Railroad*, 79 Me. 327; 9 At. 895 (1887).

⁶ *Jones v. Earl*, 37 Cal. 630, 632 (1869).

⁷ *Rucker v. Donovan*, 13 Kans. 251 (1874).

⁸ *Ex parte Falk*, 7 App. Cas. 573 (1882).

(b) *Invalid Notice.* — A notice to the buyer not to take possession of the goods,¹ or to hold the proceeds for the seller,² is ineffectual as an attempted exercise of the right of stoppage *in transitu*.

(c) *Expenses which Seller must defray.* — In case the right is exercised by giving notice to the carrier, or to a third person who has received delivery from the carrier, it becomes the duty of the vendor to defray the transportation charges which have accrued against the goods;³ but he is under no obligation to pay charges due from the buyer to the carrier on account of other goods.⁴ If the vendor, instead of taking the goods where they are at the time of stoppage, requires their redelivery, he must bear the expenses thereof.⁵

5. *Effect of exercising the Right.* — By stopping the goods, the vendor does not rescind the sale, but regains possession. As soon as the right is duly exercised, the middleman holds the goods for the vendor, and is bound to surrender them to him upon demand and tender of legal charges.⁶ His liability to deliver to the vendee ceases, although the latter may hold a bill of lading calling for the delivery of the goods to him.⁷ Indeed, compliance with such a bill, after due notice of stoppage has been given, would subject the carrier to an action by the vendor for conversion.⁸ If the carrier improperly refuses to recognize the seller's right to the possession of the

¹ *Mottram v. Heyer*, 5 Den. (N. Y.) 629, 635 (1846).

² *Phelps v. Comber*, 29 Ch. D. 813 (1885).

³ *Penn. Co. v. Am. Oil Works*, 126 Pa. St. 485; 17 At. 671 (1889).

⁴ *Potts v. N. Y. & N. E. Ry.*, 131 Mass. 455, 457 (1881).

⁵ *Sale of Goods Act*, § 46 (2).

⁶ *Babcock v. Bonnell*, 80 N. Y. 244 (1880); *Diem v. Koblitz*, 49 Ohio St. 41; 29 N. E. 1124 (1892).

⁷ *The Vidette*, 34 Fed. R. 396 (1888).

⁸ *Litt v. Cowley*, 7 Taunt. 169 (1816); *Jones v. Earl*, 37 Cal. 630 (1869).

goods, the latter may be compelled to ask for an injunction,¹ or for some other extraordinary remedy.² On the other hand, the carrier may find it necessary to interplead the seller and some other claimant of the property.³

(a) *Doctrine of Newhall v. Central Railway.*—It has been held by one court that the due exercise of the right of stoppage *in transitu* by the seller will not affect the title of a subsequent *bona fide* assignee of the bill of lading.⁴ This decision is based on the doctrine that the vendor's lien, after the right of stoppage has been duly exercised, "is only a secret trust as to a person who takes an assignment of a bill of lading 'without notice of such circumstances as render the bill of lading not fairly and honestly assignable.'"

But the vendor's lien is something more than a secret trust. It is a legal interest in the property. The contest between an unpaid vendor, who has stopped the goods, and a subsequent assignee of the bill of lading depends upon the question "which party can establish the better legal title."⁴ The right of stoppage *in transitu*, as Lord Blackburn has established beyond controversy, is not, as Mr. Justice Buller supposed, and as many judges still appear to think, "an equitable right adopted into the law." If it were, "it would follow" (as the California court declared) that the right "could prevail only against those who had an inferior equity." But the right has its origin in "the custom of merchants," and by "the *lex mercatoria*, as practised in England, . . . it may be defeated before the goods have come to the end of the transitus, by the assignment of the bill of lading to one

¹ *Schotsmans v. Lancashire Ry.*, L. R. 2 Ch. App. 332, 340 (1867).

² *The Tigress*, 32 L. J. Adm. 97, 102 (1863).

³ *Newhall v. Central Railway*, 51 Cal. 345 (1876).

⁴ *Stanton v. Eagar*, 16 Pick. (33 Mass.) 467, 473 (1835).

who *bona fide* gives value for a property in the goods, and in no other way.”¹

(b) *Bill of Lading must be transferred before Stoppage.* — If this doctrine had been applied in *Newhall v. Central Railway*, a different conclusion would have been reached. As soon as the right of stoppage was exercised, the vendor's lien was restored. A subsequent transfer of the bill of lading to a *bona fide* purchaser would have the same effect, so far as the vendor's rights were concerned, that any actual delivery of the goods themselves would have had. It would confer no greater rights upon the purchaser. “The transfer of the document of title, by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.”² And the California court does not rest its decision on any Factors Act, or similar legislation, which had changed the common law. The second purchaser, therefore, should have been treated as taking only such title as his vendor had; and that was a title subject to the original vendor's lien.

§ 6. Seller's Right of Resale.

Having re-established his lien, by the exercise of his right of stoppage *in transitu*, the next question which confronts the vendor is, What can he lawfully do with the goods?

1. *Nature of Vendor's Lien.* — If his claim against them were a mere lien, he would be entitled to hold them as security for the price, but, in the absence of authority from the vendee, he could not sell without resort to foreclosure proceedings. Such, however, is not the nature of

¹ Blackburn on Sales (2d ed.), 319, 320.

² *Cole v. N. W. Bank*, L. R. 10 C. P. 354, 363 (1875).

his claim. "His right is very nearly that of a pledgee, with power to sell at private sale in case of default."¹

When the sale is upon credit, and the buyer becomes insolvent before the term of credit expires, the seller, if remaining in possession, or upon regaining possession, has the right to demand cash for the goods. There is an implied engagement on the part of a buyer who asks and receives credit to keep that credit good. This is broken by his insolvency, and the breach puts "him in the same situation as if there had been no bargain for credit."²

The seller may refuse to deliver the goods unless the price is paid. But the insolvency of the buyer does not *ipso facto* annul the sale contract.³ Hence, if the purchaser, or one lawfully claiming under him, pays or tenders the price within a reasonable time, the seller must deliver the goods.⁴ In case no such payment or tender is made, or in case the purchaser is already in default, when the seller regains his lien, the latter may resell the goods, and if the resale does not result in satisfying his claim, the loss may be recovered from the buyer, as damages.

2. *How should Resale be made?* — In England, this question has been answered by statute. If the goods are perishable, the unpaid vendor may sell at once and without notice. In other cases, he should give notice to the buyer of his intention to resell, and the latter has a reasonable time thereafter within which to pay or tender the price.⁵

¹ Tuthill v. Skidmore, 124 N. Y. 148, 154; 26 N. E. 348 (1891).

² Bloxam v. Sanders, 4 B. & C. 941 (1825); Grice v. Richardson, 3 App. Cas. 319; 47 L. J. N. S. P. C. C. 48 (1877); Diem v. Koblit, 49 Ohio St. 41; 29 N. E. 1124 (1892).

³ McElroy v. Seery, 61 Md. 389; 48 Am. R. 110 (1883).

⁴ Newhall v. Vargas, 15 Me. 314 (1839); Patten's Appeal, 45 Pa. St. 151, 159 (1863); *Ex parte Stapleton*, 10 Ch. D. 586, 590 (1879).

⁵ Sale of Goods Act, § 48 (3); Page v. Cowasjee, L. R. 1 P. C. 127, 145 (1866), qualifying the doctrine in *Martindale v. Smith*, 1 Q. B. 389 (1841).

In this country, upon default by the purchaser, whether that default consist in his failure to take and pay for the goods at the stipulated time and place, or in his failure to pay cash within a reasonable time after his insolvency,¹ the vendor may resell the property, acting as the purchaser's agent in the matter, and entitle himself to damages to the extent of any ensuing loss.²

(a) *Notice of Intention to resell.* — In most of the reported cases, the seller has taken the precaution of giving notice to the defaulted buyer of his intention to resell; and many courts have assumed that such a notice is necessary.³ Other courts have ignored, doubted, or even disputed the necessity of such notice.⁴ Clearly if the default consists in the buyer's refusal to take or pay for the goods, any notice by the vendor of his intention to resell is superfluous. It "could only operate in the way of a threat to induce compliance. If having once refused to comply with the contract, there be *locus poenitentiae* for the buyer, he must avail himself of it without further notice from the seller."⁵

(b) *Notice of Time and Place of Resale.* — That this is unnecessary is now well settled. In reselling the goods for the purpose of enforcing his lien, the vendor acts as the vendee's agent. "But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold, or exposed for sale. Indeed, in a majority of cases such

¹ *Diem v. Koblitz*, 49 Ohio St. 41, 59 (1892).

² *Sands v. Taylor*, 5 Johns. (N. Y.) 395 (1810).

³ *Saladin v. Mitchell*, 45 Ill. 79, 85 (1867); *Rosenhams v. Weeden*, 18 Grattan (Va.), 785, 793 (1868).

⁴ *Gaskell v. Morris*, 7 W. & S. (Pa.) 32, 38 (1844); *Jones v. Marsh*, 22 Vt. 144 (1850); *Dustan v. McAndrew*, 44 N. Y. 72 (1870); *Ullman v. Kent*, 60 Ill. 271, 274 (1871).

⁵ *Waples v. Overaker*, 77 Tex. 7, 13; 13 S. W. 527 (1890); *Plumb v. Campbell*, 129 Ill. 101, 110, 111; 18 N. E. 790 (1889).

a notice would be entirely impracticable. . . . The only requisite to such a sale as a measure of the rights and the injury of the party, is good faith, including the proper observance of the usages of the particular trade.”¹ Undoubtedly, if notice of the time and place of sale is practicable, the safe course for the seller to pursue is to give a fair notice.² When the vendor resells as the buyer’s agent, their relations subject him to the duty of obeying proper instructions from the buyer, which can be followed “without sacrificing his lien for the contract-price. In the absence of any such instructions he has the right to exercise his discretion within reasonable bounds.”³

3. *Title of Buyer on a Resale.* — This depends upon the legality of the transaction. If the vendor resells after rightfully exercising the right of stoppage *in transitu*, or after default by the purchaser while the goods remain in the vendor’s possession, the buyer’s title under such resale cannot be shaken by the first purchaser.⁴ A tortious resale by the vendor, however, has no such result. He can give no better title than he has; and unless the second purchaser can bring himself under the sheltering provisions of some legislative enactment, he must surrender the goods to the true owner, the first purchaser, or respond in damages for their conversion.⁵

§ 7. Rescission of the Contract.

Although the insolvency of the buyer does not of itself annul the sale contract, it may be accompanied by such

¹ *Pollen v. Le Roy*, 30 N. Y. 549, 556, 557 (1863). Cf. *Holland v. Rea*, 48 Mich. 218; 12 N. W. 167 (1882).

² *Van Brocklin v. Smeallie*, 140 N. Y. 70, 75 (1893).

³ *Smith v. Pettee*, 70 N. Y. 13, 18 (1877).

⁴ *Milgate v. Kebble*, 3 M. & Gr. 100 (1841); *Sale of Goods Act*, § 48 (2).

⁵ *Langton v. Higgins*, 4 H. & N. 402; 28 L. J. Ex. 252 (1859); *Cohen v. Foster*, 61 L. J. Q. B. 643 (1892); *Bowser v. Birdsell*, 49 Mich. 5; 12 N. W. 888 (1882).

conduct on his part as to show his repudiation of the contract, and to justify the vendor in rescinding it. Indeed, his repudiation will be inferred easily. For example, the buyer's failure to offer performance, or to demand it, for two months after giving notice of his insolvency, and his omission of the contract from the statement of his affairs presented to his assembled creditors as a basis of composition with them, have been deemed ample evidence of a repudiation; while the seller's failure to tender performance or to call for it was considered sufficient evidence of rescission by him.¹

The principles applicable to such a case are stated very clearly in Lord Esher's opinion. The defendants (the sellers) "would have a right to rescind if the plaintiffs (the buyers) had rescinded, or if the plaintiffs having so behaved themselves as to give them reasonable grounds to conclude that the plaintiffs had abandoned the contract, they did so conclude. I think the declaration of insolvency, unaccompanied by any subsequent intimation of any intention to enforce the contract, did give the defendants such reasonable grounds; and if they acted upon them, and themselves came to the conclusion to rescind the contract, it would be rescinded. As I before said, I think the smallest evidence would be sufficient of their having done so, and I think it is supplied by the fact they did nothing to show that they wished to go on with the contract, and broke from what is stated to have been their ordinary course of trade, viz., by not delivering as usual without any demand for delivery."

(a) *Rejection of Goods which conform to the Contract.* — Even though the sale transaction has gone so far that the buyer cannot reject the goods without breaking his contract, yet if an absolute title has not vested in him he may, upon finding himself insolvent, reject them and

¹ *Morgan v. Bain*, L. R. 10 C. P. 15, 28 (1874).

thus prevent their passing to his assignee or his general creditors. His rejection, for the sole purpose of enabling the seller to rescind the contract and retain the goods, is deemed not only legal but commendable ;¹ it prevents the property of the unpaid seller going to pay the debts of the insolvent buyer.

(b) *Refusal to receive Goods after Title has passed.* — The courts will strive to give effect to the buyer's refusal to receive goods, although the title has vested in him absolutely. Accordingly, if he declines to take possession of them from a carrier or custodian, their transit may be prolonged thereby, and thus the seller may be afforded an opportunity of regaining his lien.²

But, suppose the insolvent buyer has acquired both title and possession, can he assent to a rescission of the sale, and thus prevent the goods from passing to his assignee or from being available to his general creditors? The answer depends upon the statutory provisions in the particular jurisdiction. It may fall under the ban of bankruptcy legislation and be void as a fraudulent performance given by the failing buyer to one of his creditors. In a leading English case on this subject Lord Kenyon declared, "the rules of bankruptcy law are framed with a view to benefit the bankrupt's creditors in general, and not to give a preference to any in particular. It is said, however, that the vendor may in all cases rescind his contract with the consent of the vendee at any time before the bankruptcy of the latter; but if that were so, all the creditors of a bankrupt, whose goods remained in specie, might,

¹ *Nicholson v. Bowen*, 1 E. & E. 172 (1858); *Grout v. Hill*, 4 Gray (70 Mass.), 361 (1855); cf. Lord Mansfield's explanation of *Atkyns v. Barwick* (1 Str. 165) in *Harman v. Fisher*, Cow. 117, at p. 125 (1774).

² *Bartram v. Farebrother*, 4 Bing. 579; 6 L. J. C. P. 125 (1828); *Bolton v. Lancashire Ry.*, L. R. 1 C. P. 431.

when they found that he was in insolvent circumstances, go to the bankrupt's property and bring away what each had contributed to the fund, leaving nothing to satisfy the rest of the creditors." ¹

In a jurisdiction, however, where no such statutory policy obtains, and where an insolvent debtor may lawfully prefer one creditor to another, such a rescission will be upheld.² The buyer, finding himself unable to pay for the goods, may, according to some authorities, deliver them to a third person in trust for the unpaid vendor, and, unless the latter disaffirms the trust in his favor, title will be held to have revested in him at the time of such delivery. Such a buyer is declared to have "parted with all claim in or title to the property. He did all in his power to restore the property to the vendor. He acted with an honesty which ought to be encouraged and commended, not overreached and nullified by any manner of technical rules at variance with equity and common justice." ³

(c) *Rescission pursuant to a Term of the Contract.* — When the sale contract provides that the seller may resell the goods in case the buyer should make default, the English courts have declared that the seller's exercise of this right rescinds the contract.⁴ Notwithstanding the rescission, however, he may maintain an action for such damages as he has suffered by the purchaser's default.⁵

(d) *Vendor's Right to regain Title in America.* — The general rule in this country is that the seller, upon the buyer's default, whether the latter is insolvent or not, and whether his conduct is such as to show a settled determination to repudiate the contract or not, may, although

¹ Barnes v. Freeland, 6 D. & E. 80, 85 (1794).

² Seed v. Lord, 66 Me. 580, 582 (1876).

³ Sturtevant v. Orser, 24 N. Y. 538 (1862).

⁴ Lamond v. Duvall, 9 Q. B. 1030 ; 16 L. J. Q. B. 136 (1847).

⁵ Sale of Goods Act, § 48 (4).

title has passed to the buyer, elect to keep the property as his own and recover damages for the buyer's breach.¹ These damages will ordinarily be the difference between the contract-price and the fair value of the property when the contract is broken. If the seller elects to revest title in himself, any profit which accrues, from keeping the property and selling it at a later period, is his.² And in cases of this kind, though the buyer may have made a partial payment before his refusal to take the goods and to pay the balance, he will not be entitled to any of the proceeds of a subsequent sale of the goods by the vendor.³ The buyer's refusal to go on with the contract precludes him from recovering the money he had paid. In a leading case upon this point, the court said: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have."⁴ The buyer's breach of the contract gives the seller the right to treat the property as his own, according to the prevailing view in this country. If he so treats it, he is under no duty to account to the defaulted buyer for its proceeds.

¹ *Hayden v. Demets*, 53 N. Y. 426, 431 (1873).

² *Bridgford v. Crocker*, 60 N. Y. 627 (1875); *cf.* *Campbell on Sales* (2d ed.), p. 451.

³ *Neis v. O'Brien*, 12 Wash. 358; 41 Pac. 59 (1895).

⁴ *Ketchum v. Evertson*, 12 Johns. (N. Y.) 358, 364 (1816).

APPENDIX I.

CONTINENTAL LEGISLATION : CODE NAPOLEÓN.

Art. 2279. In the case of moveables, possession is equivalent to a title. Nevertheless, the party who has lost anything, or from whom it has been stolen, may reclaim it within three years from the day of the loss or robbery, against the party in whose hands he finds it; saving to the latter his remedy against the person from whom he obtained it.

Art. 2280. If the actual possessor of the thing stolen or lost has purchased it in a fair or market, or at a public sale, or from a shopkeeper dealing in similar articles, the original owner can only have it restored to him on repaying the possessor the price which it cost him.

GENERAL COMMERCIAL CODE OF GERMANY.

Art. 306. SALE. — If goods or other moveables are disposed of and transferred by a trader, in the course of his business, a *bona fide* transferee acquires the ownership thereof, even where the transferor was not owner. Ownership based on a prior title is extinguished. Every prior right of pledge or other right *in rem* is extinguished if it was unknown to the transferee at the time of transfer.

PLEDGE. — If goods or other moveables are pledged and transferred by a trader in the course of his business, all rights of ownership, rights of pledge, or other rights *in rem* founded on prior title cannot be enforced to the disadvantage of the *bona fide* pledgee or his successor in title.

LIEN. — The right of lien by law given to commission agents, forwarding agents, and carriers, is of equal force to a right of pledge acquired by contract.

This article does not apply if the goods were stolen or lost.

APPENDIX II.

THE FACTORS ACT, 1889.

(52 & 53 VICT. c. 45.)

An Act to amend and consolidate the Factors Acts.

[26th August, 1889.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Preliminary.

1. *Definitions.*— For the purposes of this Act—

(1) The expression “mercantile agent” shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods :

(2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf :

(3) The expression “goods” shall include wares and merchandise :

(4) The expression “document of title” shall include any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented :

(5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability.

(6) The expression "person" shall include any body of persons corporate or unincorporate.

Dispositions by Mercantile Agents.

2. *Powers of mercantile agent with respect to disposition of goods.* — (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

(2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent: provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. *Effect of pledges of documents of title.* — A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. *Pledge for antecedent debt.* — Where a mercantile agent

pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. *Rights acquired by exchange of goods or documents.* — The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. *Agreements through clerks, &c.* — For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorised in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. *Provisions as to consignors and consignees.* — (1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

Dispositions by Sellers and Buyers of Goods.

8. *Disposition by seller remaining in possession.* — Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or

other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

9. *Disposition by buyer obtaining possession.* — Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. *Effect of transfer of documents on vendor's lien or right of stoppage in transitu.* — Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu.

11. *Mode of transferring documents.* — For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12. *Saving for rights of true owner.* — (1) Nothing in this Act shall authorise an agent to exceed or depart from his authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing.

(2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on

satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would by law be entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien.

(3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set off on the part of the buyer against the agent.

13. *Saving for common-law powers of agent.* — The provisions of this Act shall be construed in amplification and not in derogation of the powers exerciseable by an agent independently of this Act.

14. *Repeal.* — The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act under any enactment hereby repealed.

15. *Commencement.* — This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16. *Extent of Act.* — This Act shall not extend to Scotland.

17. *Short Title.* — This Act may be cited as the Factors Act, 1889.

THE FACTORS (SCOTLAND) ACT, 1890.

(53 & 54 VICT. c. 40.)

An Act to extend the Provisions of the Factors Act, 1889, to Scotland.

[14th August, 1890.]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. — Subject to the following provisions, the Factors Act, 1889, shall apply to Scotland : —

(1) The expression "lien" shall mean and include right of retention; the expression "vendor's lien" shall mean and include any right of retention competent to the original owner or vendor; and the expression "set off" shall mean and include compensation.

(2) In the application of section five of the recited Act, a sale, pledge, or other disposition of goods shall not be valid unless made for valuable consideration.

2. — This Act may be cited as the Factors (Scotland) Act, 1890.

THE EARLIER FACTORS ACTS IN ENGLAND.¹

The following sketch of the earlier Factors Acts, which Mr. Justice Chalmers has happily described as models "of the art of saying a few things in many words," is taken from a recent English treatise.² "The Legislature, in determining to alter the law, had two courses open to it; either to recognize the doctrine 'that possession constitutes title' to the full extent to which it was recognized on the Continent, by conferring a good title in every case upon innocent persons dealing with persons in the apparent ownership of goods as if they were the real owners, or by an extension of the doctrine of estoppel, to limit the protection to the particular case of innocent persons dealing with mercantile agents under similar circumstances. The Legislature adopted the latter course, but in a very tentative and cautious spirit, owing, we may presume, to the legal opposition raised in the House, and the immediate result was the Factors Act, 4 Geo. IV. c. 83.

"This Act went a very little way. It altered the law as to pledging only in the particular case of consignments by sea. . . . The Act fell far short of the protection required, and was speedily followed by the Factors Act, 6 Geo. IV. c. 94. . . . After confirming the protection given by the earlier Act to consignees, it proceeded to extend the doctrine of estoppel, so as to

¹ Various arguments for and against the first two Factors Acts will be found in a note to *Blaudy v. Allen* (1828), Dawson and Lloyd's *Merc. Cas.* pp. 22-32.

² Pearson-Gee's *New Factors Act*, London, 1890, p. 8 and on.

give validity to a pledge made by a factor who was clothed with ostensible ownership of goods, by being 'intrusted with and in possession of' a 'document of title' to goods, as specified by the Act. . . . So far, the Act required that the pledgee should be ignorant of the factor's real character. . . . But then it went a step forward, and provided that even when the pledgee knew the person he was dealing with was a factor, the pledge . . . should transfer the factor's lien to the pledgee, and to this extent only trenched upon the rule laid down in *Paterson v. Tash*.¹ The Act dealt also with the sale of goods by a factor, but on this point only confirmed the common law, as laid down in several then recent decisions, to the effect that for a sale to be valid by the application of the principle of estoppel, the agent, who was clothed with the ostensible ownership of the goods, must be one who has an implied authority to sell, either in fact or from the nature and scope of his employment, and the purchaser must have no notice of the agent's want of authority to sell.² . . . It provided for the right of the true owner to redeem his goods from the factor or his trustee in bankruptcy, or the goods or their proceeds from a purchaser or pledgee from the factor, subject to certain conditions. It also contained penal clauses dealing with the case of a factor fraudulently pledging the goods of his principal.

"The law remained on this footing until the year 1842. It proved to be altogether insufficient as a protection for merchants, who also found, in the stringency with which its provisions were construed by the courts, the greatest difficulty in availing themselves of the benefits which it was intended to confer. The Legislature again interfered, and the Factors Act of 1842 (5 & 6 Vict. c. 39) was passed. . . . The Act extended the principle of estoppel to the case of a pledge made by a known agent (*i. e.*, a factor), who is 'intrusted with the possession of goods, or of the documents of title relating to them;' thus, by the way, extending to the possession of goods the same protection which the Factors Act of 1825 confined to the possession of a document of title." In construing the words,

¹ 2 Strange, 1178 (1743).

² *Wilkinson v. King*, 2 Camp. 335 (1809); *Pickering v. Busk*, 15 East, 38 (1812); *Dyer v. Pearson*, 3 B. & C. 38 (1824).

“agent intrusted” in these acts, the courts “decided that the ‘agent’ must be one to whose employment a power of sale was ordinarily incident, *i. e.*, a factor, or an agent whose employment corresponded to that of a factor; but they further decided that the agent must have received possession of the goods in his capacity as agent for sale, and either for the specific purpose of sale, or for some object connected with the sale. Possession *per se* was only presumptive evidence of intrustment, and it was open to the owner of the goods to repel the presumption, and prove that there was no intrustment in fact. . . . Hence it resulted that a pledgee, and, apparently, a purchaser from an agent so in possession, ran the risk of the owner being able to prove that the goods had been sent to the factor, not for sale, but to be warehoused¹ or forwarded, or that they were in the factor’s possession by way of pledge or of loan. A striking illustration of the hardship and risk entailed upon merchants by this interpretation was given in the case of a person making advances to a factor whose authority had been secretly revoked, it being decided that the revocation of authority put an end to the factor’s power to pledge, on the ground that, although in possession, he was no longer intrusted with the goods.² . . . We need not pause to further consider the provisions of the Factors Act of 1842; it relaxed the stringency of judicial interpretation in certain cases which had been ruled outside the operation and benefit of the earlier acts.³ . . .

“The statutory law remained in this condition for thirty-five years. In 1877 the Legislature again interfered by an enactment, 40 & 41 Vict. c. 39. . . . After amending the law with respect to the secret revocation of a factor’s authority, the Act proceeds to extend the operation of the earlier acts, and the principle of estoppel upon which they were based, by in effect enacting that a seller or a buyer in possession of a document of title to goods sold should be able to make as valid a sale or

¹ *Cole v. Northwestern Bank*, L. R. 10 C. P. 354 (1875).

² *Fuentes v. Montis*, L. R. 3 C. P. 268 (1868).

³ The effect of this act upon the decisions in those cases is stated with great clearness by Lord Blackburn in *Cole v. Northwestern Bank*, *supra*, at pp. 364–371. The development of the law in England on this subject is discussed in Blackwell’s *Law of Factors*, Appendix 1, London, 1897.

pledge as if he were an 'agent' or 'person intrusted' by the other within the meaning of the Factors Acts; provided that the purchaser or pledgee had no notice of the previous sale, and the first purchaser's rights thereunder, or of the original vendor's rights, as the case might be. . . .

"The Factors Act of 1877 marked a fresh stage in the history of legislation for the protection of persons dealing with those who are clothed with the ostensible ownership of property. Strictly speaking, it lay altogether outside the scope of the earlier Factors Acts, because it went beyond the class of commercial agents from which those acts received their name, and to which their operation was, by the strictness of judicial interpretation, practically confined; but it must not be overlooked that its application reached only to a particular class of persons indicated; *i. e.*, sellers and buyers in possession of a document of title to goods. . . . To this limited extent only had the Legislature thought fit to recognize the doctrine that possession gives title, — a doctrine which prevails among the commercial nations of Europe, and which the Committee of the House of Commons appointed in 1823 so strongly urged upon Parliament to adopt in this country."

APPENDIX III.

FACTORS ACT OF NEW YORK.

(L. 1830, c. 179.)

An Act for the Amendment of the Law relative to Principals and Factors or Agents.

SECTION 1. After this Act shall take effect, every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon, (1) for any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and (2) for any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

SECT. 2. The lien provided for in the preceding section shall not exist where such consignee shall have notice by the bill of lading or otherwise, at or before the advancing of any money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

SECT. 3. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obliga-

tion in writing given by such other person upon the faith thereof.

SECT. 4. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

SECT. 5. Nothing contained in the two last preceding sections of this Act shall be construed to prevent the true owner of any merchandise so deposited from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

SECT. 6. Nothing contained in this Act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

SECT. 7. (Repealed L. 1886, c. 593.)

SECT. 8. Nothing contained in the last preceding section shall be construed to prevent the Court of Chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandise so intrusted or consigned, against the factor or agent by whom such merchandise shall have been applied or sold contrary to the provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

FACTORS ACT OF MASSACHUSETTS.

(PUBLIC STATUTES, c. 71.)

SECTION 1. Every factor or other agent intrusted with the possession of merchandise or of a bill of lading, consigning merchandise to him for the purpose of sale, shall be deemed to be the true owner of such merchandise, so far as to give validity to any *bona fide* contract made by him with any other person for the sale of the whole or a part thereof.

SECT. 2. Every person in whose name merchandise is shipped for sale by a person in the lawful possession thereof at the time of the shipment shall be deemed to be the true owner thereof so far as to entitle the consignee to a lien thereon for money advanced or securities given to the shipper for or on account of such consignment, unless the consignee, at or before the time when he made the advances or gave the securities, had notice by the bill of lading or otherwise that the shipper was not the actual and *bona fide* owner.

SECT. 3. When a person intrusted with merchandise, and having authority to sell or consign the same, ships or otherwise transmits or delivers it to any other person, such other person shall have a lien thereon for any money or merchandise advanced or for any negotiable security given by him, on the faith of such consignment, to or for the use of the person in whose name the consignment or delivery was made, and for any money, negotiable security, or merchandise received for the use of such consignee by the person in whose name the consignment or delivery was made, if such consignee had, at the time of such advance or receipt, probable cause to believe that the person in whose name the merchandise was shipped, transmitted, or delivered was the actual owner thereof, or had a legal interest therein to the amount of said lien.

SECT. 4. When a consignee or factor, having possession of merchandise with authority to sell the same, or having with such authority possession of a bill of lading, permit, certificate, or order for the delivery of merchandise, deposits or pledges such merchandise or a part thereof or such document with any other person as a security for money or merchandise advanced

or for a negotiable instrument given by him upon the credit thereof, such other person (if he makes such loan, advance, or exchange in good faith and with probable cause to believe that the agent making the deposit or pledge had authority so to do and was not acting fraudulently against the owner of such merchandise) shall, notwithstanding he has notice of such agency, acquire the same interest in and authority over such merchandise and documents as he would have acquired if the agent had been the actual owner thereof.

SECT. 5. When such merchandise or document is accepted in deposit or pledge for an antecedent debt due from such consignee or factor, the person receiving the same shall thereby acquire no other or further right or interest in or authority over or lien upon the same than the consignee or factor might have enforced against the actual owner.

SECT. 6. The provisions of the three preceding sections shall not affect the lien of a consignee or factor for the expenses and charges attending the shipment, transportation, and care of merchandise intrusted to him; nor prevent the actual owner of merchandise from recovering it, previous to any pledge thereof, from the consignee or factor or from his assignee in case of his insolvency, nor prevent such owner from recovering any merchandise or document so deposited or pledged, upon tender of the money and restoration of the negotiable security or property so advanced to such consignee or factor, and upon tender of such further sum of money and restoration of such negotiable instrument or property as may have been advanced or given by the consignee or factor to the owner, or upon tender of a sum of money equal to the amount or value of such merchandise; nor prevent him from recovering from a person with whom such merchandise has been so deposited or pledged any balance of money remaining in his hands as the proceeds of the sales thereof, after deducting the amount or value of the money or negotiable security so advanced thereon.

HISTORICAL SKETCH OF THE FACTORS ACTS IN
THE UNITED STATES.

MARYLAND was the first of our States to extend by legislation the powers of factors. Its original statute on this subject¹ was an almost literal copy of the English Act of 1825; and the two statutes were to affect factors "from and after the first day of October, 1826." The act has since been remodelled,² and its language and provisions bear a striking similarity at present to the Factors Act of New York. It has given rise to but little litigation.

NEW YORK. — Early in the year 1830, a memorial³ was presented to the Legislature of this State by "sundry merchants and others of New York City," together with a draft of a statute which had been suggested by the English Factors Acts of 1823 and 1825. The memorialists declared that the rule of the common law which invalidated all pledges by factors of the property of their principals was, in their opinion, "unjust and impolitic, and required legislative revision." They believed that the rule was harmful to the principals as well as harsh towards the factors and those loaning money to them. As the factor could sell his principal's goods, and convey a valid title, although he received a lower price than that named by the principal, but could not pledge them, he was subjected to great temptation to resort to a forced sale in order to repay his advances. It was thought that this temptation would be removed by giving to the factor power to pledge, and that such power would enable him to carry the goods until the market was favorable to his principal.

The memorialists further declared that a vast amount of property was shipped to New York, from sister States and from foreign countries, in the names of factors selected by the owners, that no degree of caution or sagacity could guard the New York consignee, merchant, or banker against the claim of the original owner, who, the memorialists believed, should be the

¹ Chap. 182, L. 1825-26, passed Feb. 25, 1826.

² P. G. L. of 1888, Art. 2.

³ Senate Document, No. 46, of Jan. 19, 1830. Signed by eighty-five firms and individual traders.

only sufferer by any mismanagement on the part of an agent to whom he had intrusted his property, and of whose integrity and responsibility he alone possessed the means of judging.

In conclusion, they said: "The rule of law from which your memorialists ask to be relieved had its origin in England, and is understood to have been first adopted there in 1743, in the case of *Paterson v. Tash*, 2 Strange, 1178. It was constantly enforced by the courts of that country, though justly censured by some of its ablest jurists, until 1825, when the evils resulting from it were found so great that Parliament, after mature deliberation and inquiry, passed a statute abrogating the old rule and instituting a new one, more consonant to justice and the peculiar exigencies of trade in that country."

The Senate committee to which the memorial and draft of a bill were referred examined a number of merchants upon the subject, and reached the conclusion that the representations in the memorial, as to the nature and extent of shipments to the port of New York, the risks which the common-law rule imposed upon consignees, merchants, and bankers, and the temptation to which it subjected the factor to sacrifice the interests of his principal were fully sustained. After referring to the English Factors Acts of 1823 and 1825, the report declared: "This consequence then results from these enactments. The owner in England may pursue the property to this country and take it, wherever he can find it; while our own citizens, under the like circumstances, are compelled to submit to their losses upon goods and produce shipped to that country, whatever they may be." The bill, which had been presented by the memorialists, was therefore approved by the committee, and its adoption recommended as "a countervailing statute," in order "to place our citizens on an equal footing in this respect with the British subject."¹

Soon after the publication of this report, a formidable remonstrance was presented by "sundry merchants of Albany."² In their opinion a statute of this nature was "unnecessary, impolitic, and unjust." They asserted that the authority of factors, agents, and consignees over the property of their prin-

¹ Senate Document, No. 55, of Jan. 27, 1830.

² Senate Document, No. 105, of Feb. 8, 1830.

cipals, as settled by judicial decisions, was well understood ; that no serious evils were experienced under the existing law, and that "innovations on the common law are always hazardous, and generally prove inlets to fraud and imposition." They objected to the bill as holding out temptations to factors to defraud their principals, and as affording facilities to factors of obtaining credit upon other people's property. The third section of the bill they considered to be especially dangerous. In their opinion, it would "make the naked possession of a bill of lading, custom-house permit, or warehouseman keeper's receipt for goods evidence of actual ownership in the possessor, so as to authorize him to dispose thereof to his own use, even in case he obtains such possession feloniously or by fraudulent means, without knowledge or consent of the person to whom they belong." This fear, we shall see, has not been realized.

The remonstrance was ineffective, and the bill was passed April 16, 1830. It has remained unchanged, save for the repeal of § 7,¹ after its provisions had been incorporated into the Penal Code. It has also served as a model for similar legislation in other States.

MAINE. — In 1834, the New York Factors Act, with the omission of sections two, seven, and eight, and with a few verbal changes, became a part of the statute law of Maine. That enactment has been changed by subsequent legislation, and its remnants are found in ch. 31 of the Revised Statutes of 1883. It does not appear to have been a source of trouble to the courts.

MASSACHUSETTS. — The first Factors Act in this State was passed in 1845. While it was suggested by statutes in England, and in New York, it did not copy their provisions. It did not authorize a pledge by a factor.² It was amended in 1849. The present statutory provisions on this subject form ch. 71 of the Public Statutes, and are reprinted on a preceding page.

OHIO AND PENNSYLVANIA have made the New York Factors Act the basis of their legislation on this subject. In fact, the former State³ has copied not only the substance, but for the most part the language of the New York statute. Pennsylvania,

¹ Chap. 593, L. 1886.

² Mich. State Bank v. Gardner, 15 Gray, 362, 374 (1860).

³ Revised Statutes, §§ 3214-3220.

however, modified the New York act to some extent.¹ The report which accompanied the bill stated that "the evil complained of by the Board of Trade of Philadelphia, and by the mercantile community in general, is, that consignees and factors authorized to sell the goods of their principals, and who are held out to the world as the owners thereof, have not power to pledge the goods in their possession for advances made by persons who have every reason to believe that they are the actual owners;" that the bill was intended to remedy this particular evil, but not to go further "lest evils should be produced on the other side." The report declared that the bill had been framed with a view "to limit the power of factors more than" it was limited "in the statutes of England and New York."²

KENTUCKY³ AND WISCONSIN⁴ also copied the New York Act, but neither State appears to have found it very useful; for the former soon repealed the statute,⁵ and the latter retains but a fragment of its provisions.⁶

RHODE ISLAND'S FACTORS ACT⁷ is not a servile copy of any other statute, although its purpose and provisions are similar to those of the New York Act.

The Common Law but slightly Modified by Factors Acts. — It is apparent from the foregoing sketch that the Factors Acts in this country have wrought but a slight modification in the common law. Nor have our mercantile classes made any such demands upon the legislature for the adoption of the rule that "possession of chattels is equivalent to title," as have been pressed upon the British Parliament.

Warehouse Receipts Legislation. — Even the statutes⁸ which declare warehouse receipts and other documents of title nego-

¹ Pepper and Lewis' Digest, pp. 2027-2030.

² See Macky v. Dillinger, 73 Pa. St. 85, 90 (1873).

³ Ch. 1541, L. 1879-1880, passed May 5, 1880.

⁴ Ch. 91, L. 1863.

⁵ Ch. 761, L. 1885-1886, passed April 22, 1886.

⁶ Revised Statutes, §§ 3345, 3346.

⁷ Pub. St., ch. 136.

⁸ Statutes of this kind have been passed in California, Connecticut, Delaware, Georgia, Kentucky, Illinois, Indiana, Iowa, Kansas, Maine, South Carolina, Tennessee, and other States. The New York statute on this subject has been repealed.

tiable by delivery, fall far short of the latest Factors Act in England, in their modification of the common law. As a fair sample of this legislation, section 4425 of the Wisconsin Revised Statutes may be referred to. Its language is as follows: —

“Any such receipt, bill of lading, voucher, or other document as is mentioned in the preceding section (by warehouseman, wharfinger, master of vessel, or agent of any transportation company) shall be transferable by delivery thereof, without indorsement or assignment, and any person to whom the same is so transferred, shall be deemed and taken to be the owner of the property therein specified, so far as to give validity to any pledge, lien, or transfer, made or created by such person, unless such receipt, bill of lading, voucher, or other document shall have the words ‘not negotiable’ plainly written or stamped on the face thereof.”¹

Whether a particular document is a warehouseman’s receipt depends not upon its language, but upon the facts attending its issue. The owner of a mill in which shingles were manufactured gave the following writing: “Received from J. B. Chown, 150,000 shingles, . . . subject to the order of F. G. Steaubli, now in dry house at mill. C. H. McKnight, warehouseman;” but the court held that as the mill-owner was not a warehouseman, the writing was not a warehouseman’s receipt.²

An instrument purporting to be a warehouseman’s receipt, but which is invalid as such between the immediate parties, may be available as a document of title to a *bona fide* transferee on the ground of estoppel.³

JUDICIAL INTERPRETATION OF FACTORS ACTS.

1. *Rules of Construction.* — The courts have generally construed these statutes strictly, treating them as in derogation of the common-law rights of owners and as giving “effect to fraudulent transfers as against the owners.”⁴ Occasionally a court

¹ See *Price v. Wis. Co.*, 43 Wis. 267, 285 (1877).

² *Staubli v. Blaine Nat. Bank*, 11 Wash. 426; 39 Pac. 814 (1895).

³ *Yenni v. McNamee*, 45 N. Y. 614 (1871).

⁴ *Stevens v. Cunningham*, 3 Allen (85 Mass.), 491 (1862); *Warner v. Martin*, 11 How. (U. S.) 209, 228 (1850), and cases cited under subsequent headings.

has announced a different doctrine. In one case it was said: "The English statute and our own were manifestly passed for the purpose of increasing the facilities of trade, by legalizing and explaining cases in which a party could sell or pledge property at sea, in the ship at dock, or lying in the warehouse subject to the payment of duties. Historically, the necessities of trade and the custom of merchants had, in both countries, anticipated the statutes. And the benefits of the statutes and the custom are too evident and too great to allow us to narrow the construction of the law. And there is no sound principle which would oppose a liberal view, tending to enlarge the facilities of transfer; since these acts but follow out the general rule that every man is bound to take care not to select an agent who will do acts to injure other persons."¹

2. *Limited to Domestic Factors.* — The statute of each State was framed for the regulation of the conduct of factors within its jurisdiction, and for the protection of those dealing with them in such jurisdiction. It does not apply to sales or pledges made in a foreign country, unless it is shown that such country has substantially the same statutory provisions on this subject.²

3. *The Acts do not include all Agents.* — In England it was held under the earlier acts, "that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise, as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent, like that class (factors) from which the Act has taken its name."³

The same view prevails in this country. Accordingly, a merchant's clerk who negotiates purchases and charter parties to be ratified by his principal, and prepares and presents bills of lading for his principal's signature, is not an agent or factor intrusted with his principal's property or documents of title within the Factors Act.⁴ Nor is an employee who has charge

¹ Cartwright v. Wilmerding, 24 N. Y. 521, 529 (1862); Blyderstein v. N. Y. Secy. and Trust Co., 67 Fed. 469 (1895); cf. Price v. Wis. Ins. Co., 43 Wis. 267 (1877).

² Walther v. Wetmore, 1 E. D. Smith, 7, 20 (1850).

³ Heyman v. Flewker, 13 C. B. (N. S.) 519 (1863).

⁴ Zachrisson v. Ohman, 1 Sandf. (N. Y. Super. Ct.) 67 (1848).

of his principal's store, and is authorized only to sell in the name and for the account of his principal specific goods manufactured by the latter, an agent or factor so intrusted.¹ Nor is a jeweller, who receives a diamond ring from the owner "for the purpose of obtaining a watch for it, or, failing in that, to get an offer for it;"² nor is an agent for forwarding the goods in the owner's name to a third party for sale, although the agent is to have a share of the proceeds of sale as his compensation;³ nor is an agent who receives from the owner a picture to deliver to a third party for exhibition and sale.⁴ In the case last cited, the agent obtained a receipt in his own name from the third party, by falsely representing that "the object of the receipt was that the insurance might be transferred to the third party's store." Upon this receipt he obtained an advance from the defendant of \$50. But it was held that neither his agency nor his receipt was within the provisions of the statute.

4. *Goods must be in Transferor's Name with Owner's Consent.*—Hence, although goods may be in the possession of a factor, or may be shipped in the name of one who is not the owner, a *bona fide* purchaser from such factor or consignee may not be protected by the statute. If the owner contracts to sell for cash, and the purchaser obtains possession of the goods and secures a bill of lading to the order of a third person, by fraudulent representations made to the seller and to the carrier, neither the purchaser nor the consignee can give a valid title to the goods. "It is the consent of the owner in intrusting his goods to, and allowing a bill of lading in the name of, another, thus conferring ostensible ownership and a right of control in the person named, which shields parties entirely innocent, who, on the faith of the evidence furnished to which the owner has consented, and of which he has knowledge, have made advances on the property shipped."⁵

¹ The Florence Sewing Mach. Co. v. Warford, 1 Sweeny (N. Y. Super. Ct.) 433 (1869).

² Levi v. Booth, 58 Md. 305 (1882).

³ Covill v. Hill, 4 Den. 323; 6 N. Y. 374 (1852); cf. Davis v. Bigler, 62 Pa. St. 242, 251 (1869).

⁴ Frankenstein v. Thomas, 4 Daly (N. Y. Com. Pl.), 256 (1872).

⁵ Kinsey v. Leggett, 71 N. Y. 387, 395 (1877).

A grain broker who obtains possession of goods by fraudulently representing that he is purchasing for a third person who is to pay cash, and who thereupon has a bill of lading made out to himself and indorses it to the third person for advances made by the latter innocently to the broker, does not convey any title to such third person, although the advances are made on the faith of the broker's possession of the bill of lading.¹

Nor does the innocent purchaser from a rubber broker, relying on a warehouse receipt in the broker's name, acquire title to the goods named in such receipt, where the broker, by fraudulently representing to the owner that he had effected a sale of the goods, obtained a delivery order for them for the purpose of delivering them to the alleged purchaser, and thereupon stored them and took out the warehouse receipt in his own name. To bring a case within the New York Factors Act, "the factor or other agent must be consciously and voluntarily intrusted with the possession of the documents or merchandise, and the section can have no application whatever to a case where the documents or goods are taken by trespass or theft, and thus the possession of the factor or agent is, from the beginning, tortious, wrongful, and unlawful."²

5. *The Acts are confined to Agents intrusted for Sale.*—A purchaser of goods even from a factor who has possession thereof or of the proper documents of title thereto with the owner's consent may not be protected by the Factors Acts. They will not shield him unless his transferor was intrusted "for the purpose of sale or as a security for any advances to be made thereon."³

(a) *The Factor must have Possession.*—Unless the owner has given to the factor actual possession of the goods or of a document of title thereto, he has not clothed such agent with apparent

¹ Decan v. Shippen, 35 Pa. St. 239 (1860).

² Soltau v. Gerdau, 119 N. Y. 380, 390 (1890); H. A. Prentice Co. v. Page, 164 Mass. 276; 41 N. E. 280 (1895), *accord*.

³ The Massachusetts statute relates "to consignees and factors, but not to lessees; and to deposits and pledges, but not mortgages." Stevens v. Cunningham, 3 Allen (85 Mass.), 491 (1862). The Pennsylvania statute "only provides for the passage of title if the agent or factor had 'authority to sell the same' or to deposit or pledge it." Decan v. Shippen, 35 Pa. St. 239, 244 (1860).

ownership. "It is the act of the owner in intrusting the factor with the possession of the goods, or of a documentary evidence of ownership, the apparent ownership and right of disposal, in connection with the fact that innocent third persons deal with him upon the faith of such apparent ownership that estops the owner from following his property into the hands of *bona fide* vendees or pledgees, and gives the latter a better title than their vendor or pledgor had."¹

(b) *He must have been intrusted with that Possession for Sale.* — If the factor obtains possession of the goods or of the document of title, as a mere bailee, his transferee is not protected by the statute.² Accordingly if goods are delivered to another for storage, with authority to receive and communicate offers to the owner, but without authority to sell,³ a sale by such a bailee and agent will not affect the owner's title, even though the agent is also a factor for the sale of similar goods.⁴

If, however, the goods have been intrusted to the factor for sale, he may validly pledge them to secure a loan to himself, provided the pledgee loans the money "upon the faith that the factor is the true owner of the merchandise."⁵

6. *The Transferee must have Reason to believe that the Factor is the True Owner.* — "The statute was not made to legalize fraud; but to protect those who honestly trusted to appearances, and supposed they were dealing with the true owner."⁶ Hence one who makes advances to a factor upon goods in the latter's possession, with the owner's consent, acquires no lien on them as against the owner, if he has notice that they are not the property of the factor.⁷

¹ *Howland v. Woodruff*, 60 N. Y. 73, 79 (1875), approving *Bonito v. Mosquera*, 2 Bos. 401 (1858), and distinguishing *Pegram v. Corson*, 10 Bos. 505 (1863), and *Cartwright v. Wilmerding*, 24 N. Y. 521 (1862).

² *First Nat. Bk. v. Shaw*, 61 N. Y. 283, 301 (1874); *Davis v. Bigler*, 62 Pa. St. 242, 251 (1869).

³ *Cook v. Adams*, 1 Bos. (N. Y. Super. Ct.) 497 (1857); *Wilson v. Nason*, 4 Bos. 155 (1859).

⁴ *Nickerson v. Darrow*, 5 Allen (Mass.), 419 (1862); *Stollenwerck v. Thacher*, 115 Mass. 224 (1874); *Thacher v. Moors*, 134 Mass. 156 (1883).

⁵ *Cleveland v. Shoeman*, 40 Ohio St. 176, 184 (1883).

⁶ *Bronson, J.*, in *Stevens v. Wilson*, 6 Hill (N. Y.), 512, 513 (1844).

⁷ *Stevens v. Wilson*, 3 Den. (N. Y.) 472 (1846); *Dorrance v. Dean*, 106 N. Y. 203 (1887).

A different view is held in Wisconsin. Although the statute of that State was a copy of the New York Act, the Supreme Court refused to follow the New York decisions. Referring to the opinions delivered in the New York Supreme Court and in the Court of Errors, in *Stevens v. Wilson, Ryan, Ch. J.*, said,¹ "In both courts it was held that the words, 'on faith thereof,' in section three, mean on faith of the title of the factor, and not on faith of the thing pledged. This is admitted to do violence to the language used. To us it seems to nullify the provision that the factor shall be deemed the true owner, to give validity to the pledge; substituting the faith of the party for the title of the statute, and appearing to involve the absurdity that a pledgee makes his advances, not at all on the faith of the thing bodily pledged, but altogether on the faith of the title to it. . . . The section authorizes the pledgee to presume the factor's title and authority, without inquiry, just as the common law authorizes the pledgee to presume the factor's title and authority to pledge other negotiable paper. Of course if the factor violate the trust of his principal to the knowledge of the pledgee, the fraud will avoid a pledge as it would a sale. But to rest the validity of the pledge upon the pledgee's faith in the factor's title is simply to abandon the statute for the common law."

The Pennsylvania statute provides that the pledgee of a factor, with notice that the pledgor is only a factor, shall acquire the same right and interest in the property as was possessed by the factor against his principal. Accordingly, such a pledgee has a right to demand of the owner the payment of any sum due from him to the factor on account of the property as a condition of surrendering it.²

¹ *Price v. Wis. Marine Ins. Co.*, 43 Wis. 267, 291 (1877).

² *Macky v. Dillinger*, 73 Pa. St. 85 (1873).

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